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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

Willie R. Brown,
Petitioner,

v.

Scott Fisher, J.J. Webber,
and County of Miami, Kansas,
Respondents.

ON APPEAL FROM DECISION OF THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

by Willie R. Brown
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Questions on Appeal

1. Did the arresting officer's probable cause evaporate?

2. Did the Tenth Circuit Court of Appeals err in failing to consider that probable cause for an arrest originates in the Kansas Statutes?

3. Did the Tenth Circuit Court of Appeals err in affirming a motion for summary judgment in favor of the arresting officer, Miami County (Kansas) Deputy Scott Fisher?

4. Did the Tenth Circuit Court of Appeals err in dismissing Miami County, KS as a party to this case?

5. Is it a miscarriage of justice that the Tenth Circuit Court of Appeals can self-proclaim itself to be a mere rubber-stamper for anything the police do?

6. Does the Tenth Circuit Court of Appeals suffer for the presumption that government agents always act correctly, the assumption Willie Brown is guilty until proven innocent, and the presumption that including infractions in the general category of crimes makes them equally arrestable?

7. Did the Tenth Circuit Court of Appeals, relying upon U.S. Supreme Court decisions, effectively abolish the federal 4th Amendment?

8. Is there no qualified immunity?

PARTIES TO THIS CASE

are given in the caption to this case, in conformance to S.Ct. Rule 14.1(b). There are no corporate structure or stock holdings to disclose, and this statement conforms to S.Ct. Rule 29.6.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTERS

Brown v. Fisher, not reported in F.Supp.2d, 2006WL470580, D.Kan., Feb. 27, 2006 (No. Civ. A. 05-2268-KHV) ...Only the WestLaw citation is currently available.

Brown v. Fisher, WestLaw 3011051 (not selected for publication in the federal reports), CA 10 (Kan.), October 16, 2007 (N0. 06-3207)

JURISDICTION

(A) The date the original judgment of the Tenth Circuit Court of Appeals was entered is October 16, 2007.

(B) The date an order was given regarding a Petition for Panel Rehearing is January 2, 2008.

(C) The statutory provision that confers the Supreme Court with jurisdiction to review a writ of certiorari is 42 U.S.C. §1983, 28 U.S.C. §1381 and §1383.

THE LAW AT ISSUE

KANSAS CODE OF CRIMINAL PROCEDURE
Kansas Statutes Annotated (K.S.A.):

22-2401. Arrest by law enforcement officer. A law enforcement officer may arrest a person under any of the following circumstances:

(a) The officer has a warrant commanding that the person be arrested.

(b) The officer has probable cause to believe that a warrant for the person's arrest has been issued in this state or in another jurisdiction for a felony committed therein.

(c) The officer has probable cause to believe that the person is committing or has committed:

(1) A felony; or

(2) a misdemeanor, and the law enforcement officer has probable cause to believe that:

(A) The person will not be apprehended or evidence of the crime will be irretrievably lost unless the person is immediately arrested;

(B) the person may cause injury to self or others or damage to property unless immediately arrested; or

(C) the person has intentionally inflicted bodily harm to another person.

(d) Any crime, except a traffic infraction or a cigarette or tobacco infraction, has been or is being committed by the person in the officer's view.

History: L. 1970, ch. 129, § 22-2401; L. 1984, ch. 127, § 2; L. 1984, ch. 39, § 37; L. 1996, ch. 214, § 29; July 1.

Chapter 8.--AUTOMOBILES AND OTHER VEHICLES
Article 21.--UNIFORM ACT REGULATING TRAFFIC; PARTIES, ARRESTS, CITATIONS, PROCEDURES AND PENALTIES

K.S.A. 8-2118. Uniform fine schedule for traffic infraction violations; payment by mail with plea, when; full payment required; ordinance traffic infractions; doubling of fine in road construction zone and school zone. (a) A person charged with a traffic infraction shall, except as provided in subsection (b), appear at the place and time specified in the notice to appear. If the person enters an appearance, waives right to trial, pleads guilty or no contest, the fine shall be no greater than that specified in the uniform fine schedule in subsection (c) and court costs shall be taxed as provided by law.

(b) Prior to the time specified in the notice to appear, a person charged with a traffic infraction may enter a written appearance, waive right to trial, plead guilty or no contest and pay the fine for the violation as specified in the uniform fine schedule in subsection (c) and court costs provided by law. Payment may be made by mail or in person and may be by personal check. The traffic citation shall not have been complied with if a check is not honored for any reason, or if the fine and court costs are not paid in full. When a person charged with a traffic infraction makes payment without executing a written waiver of right to trial and plea of guilty or no contest, the payment shall be deemed such an appearance, waiver of right to trial and plea of no contest.

(c) The following uniform fine schedule shall apply uniformly throughout the state but shall not limit the fine which may be imposed following a court appearance, except an appearance made for the purpose of pleading and payment as permitted by subsection (a). The description of offense contained in the following uniform fine schedule is for reference only and is not a legal definition.

Description of Offense	Statute	Fine
Refusal to submit to a preliminary breath test	8-1012	$90
Unsafe speed for prevailing conditions	8-1557	$60
Exceeding maximum speed limit; or speeding in zone posted by the state department of transportation; or speeding in locally posted zone	8-1558 to 8-1560	
8-1560a or 8-1560b 1-10 mph over the limit,		$30
11-20 mph over the limit, $30 plus $6 per mph over 10 mph over the limit;		
21-30 mph over the limit, $90 plus $9 per mph over 20 mph over the limit;		
31 and more mph over the limit, $180 plus $15 per mph over 30 mph over the limit;		
Disobeying traffic control device	8-1507	$60
Violating traffic control signal	8-1508	$60
Violating pedestrian control signal	8-1509	$30
Violating flashing traffic signals	8-1510	$60
Violating lane-control signal	8-1511	$60
Unauthorized sign, signal, marking or device	8-1512	$30
Driving on left side of roadway	8-1514	$60
Failure to keep right to pass oncoming vehicle	8-1515	$60
Improper passing; increasing speed when passed	8-1516	$60
Improper passing on right	8-1517	$60

Passing on left with insufficient clearance	8-1518	$60
Driving on left side where curve, grade, intersection railroad crossing, or obstructed view	8-1519	$60
Driving on left in no-passing zone	8-1520	$60
Unlawful passing of stopped emergency vehicle	8-1520a	$60
Driving wrong direction on one-way road	8-1521	$60
Improper driving on laned roadway	8-1522	$60
Following too close	8-1523	$60
Improper crossover on divided highway	8-1524	$30
Failure to yield right-of-way at uncontrolled Intersection	8-1526	$60
Failure to yield to approaching vehicle when turning left	8-1527	$60
Failure to yield at stop or yield sign	8-1528	$60
Failure to yield from private road or driveway	8-1529	$60
Failure to yield to emergency vehicle	8-1530	$180
Failure to yield to pedestrian or vehicle working on roadway	8-1531	$90
Failure to comply with restrictions in road construction zone	8-1531a	$30
Disobeying pedestrian traffic control device	8-1532	$30
Failure to yield to pedestrian in crosswalk; pedestrian suddenly entering roadway; passing vehicle stopped for pedestrian at crosswalk	8-1533	$60
Improper pedestrian crossing	8-1534	$30
Failure to exercise due care in regard to pedestrian	8-1535	$30
Improper pedestrian movement in crosswalk	8-1536	$30
Improper use of roadway by pedestrian	8-1537	$30

Soliciting ride or business on roadway	8-1538	$30
Driving through safety zone	8-1539	$30
Failure to yield to pedestrian on sidewalk	8-1540	$30
Failure of pedestrian to yield to emergency vehicle	8-1541	$30
Failure to yield to blind pedestrian	8-1542	$30
Pedestrian disobeying bridge or railroad signal	8-1544	$30
Improper turn or approach	8-1545	$60
Improper "U" turn	8-1546	$60
Unsafe starting of stopped vehicle	8-1547	$30
Unsafe turning or stopping, failure to give proper signal; using turn signal unlawfully	8-1548	$60
Improper method of giving notice of intention to turn	8-1549	$30
Improper hand signal	8-1550	$30
Failure to stop or obey railroad crossing signal	8-1551	$180
Failure to stop at railroad crossing stop sign	8-1552	$120
Certain hazardous vehicles failure to stop at railroad crossing	8-1553	$180
Improper moving of heavy equipment at railroad crossing	8-1554	$60
Vehicle emerging from alley, private roadway, building or driveway	8-1555	$60
Improper passing of school bus; improper use of school bus signals	8-1556	$300
Improper passing of church or day-care bus; improper use of signals	8-1556a	$180
Impeding normal traffic by slow speed	8-1561	$30
Speeding on motor-driven cycle	8-1562	$60
Speeding in certain vehicles or on posted bridge	8-1563	$30

Improper stopping, standing or parking on roadway	8-1569	$30
Parking, standing or stopping in prohibited area	8-1571	$30
Improper parking	8-1572	$30
Unattended vehicle	8-1573	$30
Improper backing	8-1574	$30
Driving on sidewalk	8-1575	$30
Driving with view or driving mechanism obstructed	8-1576	$30
Unsafe opening of vehicle door	8-1577	$30
Riding in house trailer	8-1578	$30
Improper driving in defiles, canyons, or on grades	8-1579	$30
Coasting	8-1580	$30
Following fire apparatus too closely	8-1581	$60
Driving over fire hose	8-1582	$30
Putting glass, etc., on highway	8-1583	$90
Driving into intersection, crosswalk, or crossing without sufficient space on other side	8-1584	$30
Improper operation of snowmobile on highway	8-1585	$30
Parental responsibility of child riding bicycle	8-1586	$30
Not riding on bicycle seat; too many persons on bicycle	8-1588	$30
Clinging to other vehicle	8-1589	$30
Improper riding of bicycle on roadway	8-1590	$30
Carrying articles on bicycle; one hand on handlebars	8-1591	$30
Improper bicycle lamps, brakes or reflectors	8-1592	$30
Improper operation of motorcycle; seats; passengers, bundles	8-1594	$30

Improper operation of motorcycle on laned roadway	8-1595	$60
Motorcycle clinging to other vehicle	8-1596	$30
Improper motorcycle handlebars or passenger equipment	8-1597	$60
Motorcycle helmet and eye-protection requirements	8-1598	$30
Unlawful riding on vehicle	8-1578a	$60
Unlawful operation of all-terrain vehicle	8-15,100	$60
Unlawful operation of low-speed vehicle	8-15,101	$60
Littering	8-15,102	$100
Disobeying school crossing guard	8-15,103	$60
Unlawful operation of work-site utility vehicle	8-15,105	$60
Equipment offenses that are not misdemeanors	8-1701	$60
Driving without lights when needed	8-1703	$30
Defective headlamps	8-1705	$30
Defective tail lamps	8-1706	$30
Defective reflector	8-1707	$30
Improper stop lamp or turn signal	8-1708	$30
Improper lighting equipment on certain vehicles	8-1710	$30
Improper lamp color on certain vehicles	8-1711	$30
Improper mounting of reflectors and lamps on certain vehicles	8-1712	$30
Improper visibility of reflectors and lamps on certain vehicles	8-1713	$30
No lamp or flag on projecting load	8-1715	$60
Improper lamps on parked vehicle	8-1716	$30
Improper lights, lamps, reflectors and emblems on farm tractors or slow-moving vehicles	8-1717	$30

Improper lamps and equipment on implements of husbandry, road machinery or animal-drawn vehicles	8-1718	$30
Unlawful use of spot, fog, or auxiliary lamp	8-1719	$30
Improper lamps or lights on emergency vehicle	8-1720	$30
Improper stop or turn signal	8-1721	$30
Improper vehicular hazard warning lamp	8-1722	$30
Unauthorized additional lighting equipment	8-1723	$30
Improper multiple-beam lights	8-1724	$30
Failure to dim headlights	8-1725	$60
Improper single-beam headlights	8-1726	$30
Improper speed with alternate lighting	8-1727	$30
Improper number of driving lamps	8-1728	$30
Unauthorized lights and signals	8-1729	$30
Improper school bus lighting equipment and warning devices	8-1730	$30
Unauthorized lights and devices on church or day-care bus	8-1730a	$30
Improper lights on highway construction or maintenance vehicles	8-1731	$30
Defective brakes	8-1734	$30
Defective or improper use of horn or warning device	8-1738	$30
Defective muffler	8-1739	$30
Defective mirror	8-1740	$30
Defective wipers; obstructed windshield or windows	8-1741	$30
Improper tires	8-1742	$30
Improper flares or warning devices	8-1744	$30
Improper use of vehicular hazard warning lamps and devices	8-1745	$30

Improper air-conditioning equipment 8-1747 $30
Improper safety belt or shoulder harness 8-1749 $30
Improper wide-based single tires 8-1742b $60
Improper compression release engine braking system 8-1761 $60
Defective motorcycle headlamp 8-1801 $30
Defective motorcycle tail lamp 8-1802 $30
Defective motorcycle reflector 8-1803 $30
Defective motorcycle stop lamps and turn signals 8-1804 $30
Defective multiple-beam lighting 8-1805 $30
Improper road-lighting equipment on motor-driven cycles 8-1806 $30
Defective motorcycle or motor-driven cycle brakes 8-1807 $30
Improper performance ability of brakes 8-1808 $30
Operating motorcycle with disapproved braking system 8-1809 $30
Defective horn, muffler, mirrors or tires 8-1810 $30
Unlawful statehouse parking 75-4510a $15
Exceeding gross weight of vehicle or combination 8-1909

Pounds Overweight
up to 1000.....$25
1001 to 2000.....3¢ per pound
2001 to 5000.....5¢ per pound
5001 to 7500.....7¢ per pound
7501 and over.....10¢ per pound

Exceeding gross weight on any axle or tandem, triple or quad axles 8-1908

Pounds Overweight
up to 1000.....$25
1001 to 2000.....3¢ per pound
2001 to 5000.....5¢ per pound
5001 to 7500.....7¢ per pound

7501 and over.....10¢ per pound

Failure to obtain proper registration, clearance or to have current certification	66-1324	$272
Insufficient liability insurance for motor carriers	66-1,128 or 66-1314	$122
Failure to obtain interstate motor fuel tax authorization	79-34,122	$122
No authority as private or common carrier	66-1,111	$122
Violation of motor carrier safety rules and regulations, except for violations specified in subsection (b)(2) of K.S.A. 66-1,130, and amendments thereto	66-1,129	$100

(d) Traffic offenses classified as traffic infractions by this section shall be classified as ordinance traffic infractions by those cities adopting ordinances prohibiting the same offenses. A schedule of fines for all ordinance traffic infractions shall be established by the municipal judge in the manner prescribed by K.S.A. 12-4305, and amendments thereto. Such fines may vary from those contained in the uniform fine schedule contained in subsection (c).

(e) Fines listed in the uniform fine schedule contained in subsection (c) shall be doubled if a person is convicted of a traffic infraction, which is defined as a moving violation in accordance with rules and regulations adopted pursuant to K.S.A. 8-249, and amendments thereto, committed within any road construction zone as defined in K.S.A. 8-1458a, and amendments thereto.

(f) For a second violation of K.S.A. 8-1908 or 8-1909, and amendments thereto, within two years after a prior conviction of K.S.A. 8-1908 or 8-1909, and amendments thereto, such person, upon conviction shall be fined 1 1/2 times the applicable

amount from one, but not both, of the schedules listed in the uniform fine schedule contained in subsection (c). For a third violation of K.S.A. 8-1908 or 8-1909, and amendments thereto, within two years, after two prior convictions of K.S.A. 8-1908 or 8-1909, and amendments thereto, such person, upon conviction shall be fined two times the applicable amount from one, but not both, of the schedules listed in the uniform fine schedule contained in subsection (c). For a fourth and each succeeding violation of K.S.A. 8-1908 or 8-1909, and amendments thereto, within two years after three prior convictions of K.S.A. 8-1908 or 8-1909, and amendments thereto, such person, upon conviction shall be fined 2 1/2 times the applicable amount from one, but not both, of the schedules listed in the uniform fine schedule contained in subsection (c).

(g) Fines listed in the uniform fine schedule contained in subsection (c) relating to exceeding the maximum speed limit, shall be doubled if a person is convicted of exceeding the maximum speed limit in a school zone authorized under subsection (a)(4) of K.S.A. 8-1560, and amendments thereto.

Chapter 8.--AUTOMOBILES AND OTHER VEHICLES
Article 17.--UNIFORM ACT REGULATING TRAFFIC; EQUIPMENT OF VEHICLES

8-1701. Scope and effect of sections in article 17; unlawful acts. (a) It is unlawful for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which does not contain those parts or is not at all times equipped

with such lamps and other equipment in proper condition and adjustment as required in this article, or which is equipped in any manner in violation of any provision of any section of this article 17, or for any person to do any act forbidden or fail to perform any act required by any provision of any section of this article 17. Except as otherwise provided in K.S.A. 8-1742a, 8-1743, 8-1746 and 8-1750 to 8-1760, inclusive, and amendments thereto, any violation of this subsection (a) or of any other provision of this article 17 is a traffic infraction.

(b) Nothing contained in this article 17 shall be construed to prohibit the use of additional parts and accessories on any vehicle not inconsistent with the provisions of this article.

(c) The provisions of this article 17 with respect to equipment required on vehicles shall not apply to implements of husbandry, road machinery, road rollers or farm tractors except as specifically made applicable in this act.

(d) The provisions of this article 17 with respect to equipment required on vehicles shall not apply to motorcycles or motor-driven cycles, except as specifically made applicable by law.

(e) A low-speed vehicle which is in compliance with the equipment requirements in 49 C.F.R. 571.500 shall be deemed to be in compliance with the provisions of this article 17.

History: L. 1974, ch. 33, § 8-1701; L. 1984, ch. 39, § 14; L. 2000, ch. 179, § 22; July 1.

Chapter 8.--AUTOMOBILES AND OTHER VEHICLES
Article 17.--UNIFORM ACT REGULATING TRAFFIC; EQUIPMENT OF VEHICLES

8-1703. When lighted lamps required. (a) Every vehicle, except as provided in subsection (b), upon a highway within this state, at all times shall display lighted head and other lamps and illuminating devices as required for different classes of vehicles, subject to exceptions with respect to parked vehicles:

(1) From sunset to sunrise;

(2) when due to insufficient light or unfavorable atmospheric conditions, including smoke or fog, persons and vehicles on the highway are not clearly discernible at a distance of 1,000 feet ahead; or

(3) when windshield wipers are in continuous use as a result of rain, sleet or snow.

Stop lights, turn signals and other signaling devices shall be lighted as prescribed for the use of such devices.

(b) Motorcycles, motor-driven cycles and motorized bicycles manufactured after January 1, 1978, shall display lighted head and tail lights at all times that such vehicles are operated on any highway.

(c) Law enforcement officers shall issue a warning citation to anyone violating subsection (a)(3).

History: L. 1974, ch. 33, § 8-1703; L. 1982, ch. 45, § 1; L. 1990, ch. 49, § 1; L. 2006, ch. 182, § 3; July 1.

K.S.A. 21-3102. Scope and Application. (1) No conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state, but where a crime is denounced by any statute of this state, but not defined, the definition of such crime at common law shall be applied.

(2) Unless expressly stated otherwise, or the context otherwise requires, the provisions of this code apply to crimes created by statute other than in this code.
(3) This code does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.
(4) This code has no application to crimes committed prior to its effective date. A crime is committed prior to the effective date of the code if any of the essential elements of the crime as then defined occurred before that date. Prosecutions for prior crimes shall be governed, prosecuted and punished under the laws existing at the time such crimes were committed.
History: L. 1969, ch. 180, §21-3102; July 1, 1970.

Kansas Constitution Bill of Rights § 15. Search and Seizure. The right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.

Amendment 4 - Search and Seizure. Ratified 12/15/1791.
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

Petitioner Willie Brown was driving north on the highway toward Paola, Kansas after sunset. A county deputy on traffic patrol, Scott Fisher, noticed one of Mr. Brown's headlights was out and stopped him. Mr. Brown is very leery of patrolmen and very knowledgeable of 4th Amendment issues, so he repeatedly questioned the deputy as to his "probable cause." The deputy became irritated and demanded Brown's driver's license. Brown got out of the pickup to look for his attache case from behind the seat and the deputy ordered him back in. The deputy eventually halted Brown in his search for the license, handcuffed Brown and put him in the back seat of the patrol car, where a woman in a pretty dress was occupying the front seat. She never looked at or talked to Brown. That still remains suspicious.

Miami County Deputy Scott Fisher himself resumed the search for Brown's driver's license and found it, called it in to dispatch, and confirmed its validity, thereby proving Brown was innocent of any driver license violation. A nearby Kansas State Trooper, J.J. Webber, drove in to assist. The two officers consulted, then deputy Fisher took Brown to the Miami County Jail to book him on a failure to display a valid driver's license. Brown was kept overnight and released in the morning when the Sheriff decided there was no probable cause to hold Brown. No charges were filed.

Back at the scene of the arrest, Trooper J.J. Webber was left alone, then decided to investigate the pickup

on his own. He found an aluminum can behind the pickup seat, drove to the jail to hand it over to deputy Fisher, and the two of them charged Brown with violation of state law for having an open container.

The aluminum can was old and dry. It was labeled as Milwaukee's Best NA, "No alcohol."

STATEMENT OF ORIGINAL JURISDICTION

This case was first tried in the United States District Court (Kansas) as 05-2268-KHV-GLB pursuant to federal statute 42 U.S. Code §1983.

ARGUMENT

1. Did the arresting officer's probable cause evaporate?

Delaware v. Prouse, 440 U.S. 648 (1979), found that arbitrarily stopping a driver to check his license and car registration is unreasonable under the Fourth Amendment. A Police officer must have reasonable suspicion the driver is not license, the car not registered, or the vehicle or an occupant is other subject to seizure for a violation of law.

The deputy's original cause for action (probable cause) was a non-arrestable traffic infraction, a headlight out, per Kansas statutes. He did nothing with that cause of action, so it must be deemed abandoned. There were no tickets, no

citations, no charges, no prosecution, no trial, no records, no transcripts, no appeals. It's not a bookable offense.

When the production of a driver's license took too long (a subjective decision of the arresting officer), Willie Brown was arrested and the arresting officer finished the search for what ultimately resulted in a valid driver's license. Since there is no evidence of failure to provide the license and no evidence of refusal to provide the license, this was a false arrest under K.S.A. 8-244 (failure to display a driver's license). Once the officer, who had already confined Brown to his patrol car in handcuffs, proved that Brown was innocent, probable cause evaporated.

There are no statements anywhere in this instant appeal (at arrest, at the federal district court level, or on appeal) that the arresting officer suspected the operator had no driver's license when he pulled Brown over.

Probable cause cannot be applied retroactively.

Conclusion: Miami County Deputy Scott Fisher had absolutely no probable cause to arrest Willie Brown.

2. Did the Tenth Circuit Court of Appeals err in failing to consider that probable cause for an arrest originates in the Kansas Statutes?

The Kansas legislature explicitly decrees that headlights out (and specific other equipment defects)

are explicitly captioned as infractions only and are not arrestable in and of themselves.

The opposing lawyers admit this.

At the Tenth Circuit Court of Appeals level, during a mandated reply to Willie Brown's Motion for a Panel Rehearing, the defensive counsel admitted the statements above as their point 1. Their point 2 was an astounding distortion of federal principles to wit:

> "The Fourth Amendment requires only that a warrantless arrest be reasonable. It does not require specific state statutory authorization for the arrest. Thus, regardless of whether K.S.A. 2006 Supp. 22-2401(d) authorizes Brown's arrest, the issue remains whether the arrest was reasonable under the Fourth Amendment. Because Brown's arrest was based on probable cause, it was reasonable and does not provide a basis for Brown's Section 1983 claim."

The defense's assertion contains tremendous leaps of logic. It points out correctly that the Fourth Amendment itself contains no requirements that arrests be made according or conforming to various state statutes. The defensive counsels thereby rejected all statutes in their logic and declared the Fourth Amendment elements had to stand on their own, which is that unreasonable is overcome by reason. A reason. Some reason. Some kind of reason.

Defensive counsel then interjects this pie-in-the-sky rationale: "Because Brown's arrest was based upon probable cause, it was reasonable...."

The lawyers for the officers' summary judgments at the federal district court level argued Mr. Brown had either refused or failed to provide a valid driver's license, and such an event is arrestable by state law. However, the Tenth Circuit could find no evidence and no statement from Mr. Brown that he had either refused or demonstrated failure. As a result, the Tenth Circuit rejected the argument and turned its attention to the traffic infraction. It determined that while the driver's license statute was not violated and did not support the arrest, such an arrest could have been made upon the same set of circumstances that supported the probable cause the deputy originally suspected.

However, it is a glaring error upon the Tenth Circuit justices that none of them ever read the Kansas statutes, for if they had they would have found that Kansas legislature explicitly decrees that headlights out (and specific other equipment defects) are explicitly captioned as infractions only and are not arrestable in and of themselves.

Where does that probable cause then come from? (*See* Issue #1 above; it evaporated.) Not from the common law. Not from federal common law. Not from state common law. It can only come from the state legislated statutes. Since 1969, all common law crimes in Kansas have been abolished (K.S.A. 21-3102), and there is no probable cause to believe a

crime has been committed, is being committed, is about to be committed outside the Kansas Statutes. And these declare violations of driver's license holding to be arrestable (and that violation didn't happen) and traffic infractions are not arrestable (and that didn't happen). So by word-twisting or idea-twisting, the defensive counsels left a big gap in logic. *Wherever there is credibility gap, there is a gullibility fill.* The Tenth Circuit filled in the gap by transposing a non-ticketed traffic infraction for a non-justified license arrest.

Petitioner simply cannot support such a notion. It's intellectually dishonest.

The Tenth Circuit ultimately ruled "Though the arrest was not authorized under Kansas law, Fisher had probable cause to believe a criminal offense - albeit a very minor one - had been committed in his presence. Thus Fisher is entitled to qualified immunity on Brown's claim for unlawful arrest." Order on Petition for Rehearing, January 2, 2008, page 18.

Conclusion: This finding defies logic. These judges can't tell the difference between seizures and arrests, between infractions and misdemeanors.

3. Did the Tenth Circuit Court of Appeals err in affirming a motion for summary judgment in favor of the arresting officer, Miami County (Kansas) Deputy Scott Fisher?

The Tenth Circuit Court of Appeals recognized the cause of action by Trooper Webber (search yielding a dried up can of Miller No-Alcohol beer) was frivolous at best and unsupported as being a search incidental to an arrest because Brown had already been arrested and removed from the scene by Deputy Fisher. The federal district court of Judge Kathryn Hoefer Vratil had already declared both officers Fisher and Webber were entitled to summary judgments in their favor. The Tenth Circuit reversed the Trooper's summary judgment, but sustained the deputy's victory.

They made this preposterous finding that law enforcement officers cannot violate the Fourth Amendment relating to unreasonable searches and seizures IF they have a reason. It's a blanket statement and accepted as Truth by the Tenth Circuit.

Here's the problem: probable cause for a traffic infraction (equipment defect) does not exist outside a statute. There is no federal common law crime being investigated here. It is only Kansas's statutory provisions being enforced by a county deputy. It is apparent violations of the Kansas Constitution have occurred (Bill of Rights §15 is nearly identical to the federal 4th Amendment, both cited above) both by searches and arrest.

What is astounding about the defendants' claim that everything they arrest for is legal is the bold assertion that, without any other support, Brown's arrest was upon probable cause.

We don't find anything in the Tenth Circuit Court of Appeals decisions that the arrest was made upon probable cause. There were no tickets or citations issued for a headlight out. That's a strong indication that there was no probable cause. It does show up in Federal District Judge Kathryn Hoefer Vratil's Memorandum and Order of February 27, 2006, page 7 "Brown does not dispute that he refused to produce his driver's license, in violation of K.S.A. 8-244". Judge Vratil obviously has a different version of the Rules of Evidence that the Tenth Circuit Court of Appeals has. There was no probable cause to charge Brown with D.L. Refusal at the county level. The sheriff released Brown the next morning as he determined his own county's deputy had no probable cause to arrest this fellow who had a valid driver's license. There was no criminal case to appeal and there was no county trial. As such there is absolutely no support by the defensive counsel in this instant appeal that a crime occurred or was about to occur. Without a crime occurring, there simply is no probable cause or even reasonable suspicion present.

Yet Judge Vratil used a different standard, substituting procedure over substance. She wanted to see that Brown was rebutting any contention by the defendant officers that Brown had refused or failed to present a valid driver's license. This is because she had no objective means of validating the facts of this case. There was no trial and cross-examination of witnesses at the federal district level. Rather, it is simply the defensive counsel that posits such a claim. Even Judge Vratil does not state the deputy had probable cause.

The Tenth Circuit Court of Appeals saw through that sham. They reread the same depositions prepared for the federal district court and determined that there were no facts, no details, no conversations, no body language, and no admissions Brown had failed or refused to hand over his driver's license. Rather, the deputy himself interfered with the process of looking for it and caused any possible violation of the statute himself.

The Tenth Circuit then practiced Judge Vratil's standard of determining the validity of evidence by stating (Order on Petition for Panel Rehearing, January 2, 2008, page 13) "Brown does not dispute that he was driving with an inoperable headlight at nighttime at the time he was pulled over." Since this case is about an arrest that violates the federal Fourth Amendment, we note that headlights out are not arrestable offenses in Kansas. It's also not an arrestable offense under federal statutes. It's also not an arrestable offense under federal common law.

The county deputy had constitutional authorization to make a routine traffic stop for an equipment violation, and he may have done so (we're not sure, because probable cause does not have the foundation laid by other proof), but the arrest for a driver's license non-violation requires another instance of probable cause. In *State v. Henry*, 14 Kan. App. 416, 418, quoting *Delaware v. Prouse,* 440 U.S. 648, 663, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979), the Kansas Supreme Court held that arbitrarily stopping a driver to check his license and car registration is

unreasonable under the Fourth Amendment. A police officer must have reasonable suspicion the driver is not licensed, the car not registered, or the vehicle or an occupant is otherwise subject to seizure for a violation of the law.

So Deputy Fisher didn't have any articulated reasonable suspicion that he wondered if Brown had a driver's license. Then he dropped (abandoned) that first possible scenario to change over to mere suspicion itself that the production of a driver's license was taking too long. There's no statute against that. In other words, defendant Officer Fisher tried to apply probable cause retroactively.

Probable cause cannot be applied retroactively.

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Ninth Circuit Court of Appeals held that the arrests of both petitioners were illegal because they were not based upon "'probable cause' within the meaning of the Fourth Amendment" nor "reasonable grounds" within the meaning of the Narcotic Control Act of 1956. Here both the 4th Amendment and a federal statute are at work, as they should have been in this instant appeal.

What the defensive lawyers did at the Tenth Circuit level to confuse those judges was to substitute "warrantless arrests" for "probable cause" in their citation of the Fourth Amendment. We have found through the practice of law that lawyers misrepresent the facts, then apply federal principles to those facts,

then cite cases that have nothing at all to do with those federal principles.

Conclusion: in this instant appeal, the defensive lawyers can't even apply federal principles correctly to the Fourth Amendment, and the Tenth Circuit jumped on the same horse.

4. Did the Tenth Circuit Court of Appeals err in dismissing Miami County, KS as a party to this case?

Petitioner Brown has repeatedly shown that the County of Miami, Kansas, is responsible and liable for violations of its employees [*Monell v. Dep't of Social Services of New York City*, 436 U.S. 658 (1978)].

Defendant party Miami County objected to process of service in this federal district court case. Service of the original complaint was to be made on the county clerk or on the party's attorney. Kathy Peckman is the Miami County Clerk. She has an office in the administration building across the street and to the east of the Miami County Courthouse. The summons was served on Janet England, the Clerk of the Court in the courthouse. The lawyer for the county is David Hager. He has a pigeonhole box in the courthouse clerk's office. Janet England personally handed the summons to David Hager in the clerk's office in the courthouse that same day when he came over to pick up his mail. David Hager is authorized to accept service on behalf of Miami County. Both he and Janet England are agents of the county. David Hager was served on July 1st, 2005. Was service still effected?

K.S.A. 60-303 is the controlling statute for process of service in civil cases in Kansas: (e) *Acknowledgement or appearance.* An acknowledgement of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance.

Miami County appeared through representation by defensive counsel Stephen Pigg in his August 15, 2005, Memorandum in Opposition to Motion for Summary Judgment in the Kansas District Court to contest service. This representation exists by making statements of fact on behalf of the County. What is interesting, curious, or perhaps illegal, is that Stephen Pigg is not the attorney (formally?) representing Miami County when the appeal goes into the Tenth Circuit Court of Appeals (and he files his notice of appearance on 06/14/2006 for Scott Fisher only), but when he files the Appellee's Brief it's on behalf of Fisher and Miami County.

Counsel Pigg invokes Kansas Statutes Annotated 60-304(d)(1): "Requiring service upon one of the county commissioners or the county clerk or the county treasurer in order to serve a county."

Since service is perfected by acknowledgement of the summons pursuant to Kansas Statutes Annotated 60-303(e),
was service still effected? Kansas Federal District Local Rule 4.1 states that "In case where the Federal Rules of Civil Procedure authorize service of process

in accordance with state practice it shall be the duty of the parties seeking such service to furnish to the clerk forms of all necessary orders and sufficient copies of all papers to comply with the requirements of the state practice, together with specific instructions for the making of such service." The point of law here is not whether Willie Brown submitted forms to the clerk of the federal court, it's whether the Fed. Rules Civ. P. authorized service according to state practice, and if they did, was the Tenth Circuit Court in error when it upheld the dismissal of Miami County as a defendant for improper service of a summons?

My opinion is that the Fed. R. Civ. P. don't mention state practice at all relating to service of summons and complaint. I think serving county attorney David Hager was appropriate by Rule 4(h)(1), an officer or general agent.

5. Is it a miscarriage of justice that the Tenth Circuit Court of Appeals can self-proclaim itself to be a mere rubber-stamper for anything the police do?

In its Order and Judgment of October 16, 2007, page 15, the Tenth Circuit ruled "We may affirm on any basis supported by the record." (*Felix v. Lucent Technologies Inc.*, 387 F.3d 1146, 1164 n.17 (10th Cir. 2004). These judges then looked to the record compiled by district Judge Vratil, who noted the prime cause of action was a headlight out, and the Tenth Circuit ruled that was itself an arrestable offense.

So the Tenth Circuit judges noted that there were no facts and no law to support an arrest of Willie Brown for a driver's license violation. That much is final.

Because the Tenth Circuit judges didn't read the statutes, however, they failed to notice that equipment deficiencies are traffic infractions only and not arrestable per the statutes. When this was deftly and specifically pointed out to them by Brown's Motion for a Panel Rehearing (*see Appendix*), the defense counsel admitted the statutes indeed don't allow arrest for headlights out. When the defense then gave the bogus reason that warrantless arrests made with reason conform to the Fourth Amendment, the Tenth Circuit then affirmed the lower court's decision regarding deputy Fisher "by any other basis."

Now there's a problem that originates and is caused by the Tenth Circuit Court of Appeals itself. It likes what is called "clearly established law." The Tenth Circuit itself has given us the guidelines for invoking clearly established laws.

"Ordinarily, in order for a plaintiff to demonstrate that a law is clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d1493, 1498, (10th Cir. 1992); see also *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (a right is clearly established if the contours of the right are "sufficiently clear [so] that a reasonable official would

understand that what he is doing violates that right.")

The Tenth Circuit then gives us the clearly established law regarding evaporating probable causes: [Order and Judgment of October 16, 2007, page 15 top] "We have held [i]f police learn information that destroys their probable cause to arrest a defendant, the arrest may become illegal." *United States v. Edwards*, 242 F.3d 928, 934 (10th Cir. 2001). It exists only at the state level, and it plainly prescribes the officer's acceptable behavior. Like *State v. Rupnick*, 276 Kan. 164, 169, 72 P.3d 925 (2003) because the statutes are clear, the conclusion is *virtually inescapable*.

Then the Tenth Circuit took that clearly established law and trashed it in considering the defensive counsel's Response to Petition for Panel Rehearing of November 29th, 2007 (point 2 is that warrantless arrests made with reason don't ever violate the Fourth Amendment). The Tenth Circuit was not about to let that flimsy infraction probable cause evaporate, and ruled to affirm on any other basis.

Yes, the Tenth Circuit is mocking its own prior decisions. And yes, the Tenth Circuit appears to be going far beyond the extra mile to rubber stamp anything county deputies do.

Conclusion: the Tenth Circuit has granted a qualified immunity to anything Deputy Fisher ever has or is ever going to do, by separating qualified immunity from fact, from law, from statute, from the Fourth

Amendment. If he gets qualified immunity, every cop in America will get qualified immunity and the 4th Amendment will cease to exist overnight.

6. Does the Tenth Circuit Court of Appeals suffer for the presumption that government agents always act correctly, for the assumption that Willie Brown is guilty, and for the presumption that including infractions in the general category of crimes makes them equally arrestable?

A. There is a long-standing presumption that "Government always acts within the law and is always right." To overcome such a presumption, the opposing party has to provide proof that such a presumption is not valid.

Petitioner Brown has done that by directing your attention to the specific Kansas Statutes.

B. The presumption of innocence does not mean that the court believes Willie Brown is innocent. On the contrary, the court believes he is guilty because a warrantee has been made by a responsible party to the court that they can make the link between proof and claim to outweigh that presumption.

Until such time when the assertion is tested, Willie's presumption prevails and he is innocent. However, since the prosecution has given it's assurance, the court will assume him as being guilty even though he was presumed innocent. The court can place restrictions on him until such time when the

prosecution has opportunity to present its evidence to prove its assertion.

The prosecution's assertion is not timeless. By making the assertion it also warrants that it has all the evidence it needs and needs no more evidence to prevail over Willie's presumption. The prosecution assures the court that it is ready for trial at a place and time of the court's choosing. To prevent indefinite delays as to the trial there are statutes of limitations, time expiring points where if the assertion is not tested in a timely manner, it goes away. In that event, the presumption prevails.

If the prosecution's assertion is not tested in a timely manner, or if it fails in any way to prove its assertion, then Willie's presumption takes precedence.

The one who owns the presumption has nothing to prove.

The facts of this case are that there was no prosecution. No trial. No conviction. No warrantee by the government. No link to criminal activity for an arrest for an equipment violation and none for an invalid driver's license. Willie Brown must be presumed to be innocent all the way through this civil suit, and the assumption that he is guilty has failed.

C. Since the cause of action of traffic equipment defects only originates in Kansas statute, the Tenth Circuit erred in presuming, assuming, or being swindled by Brown's opposition that the Fourth Amendment somehow authorizes blanket use of the

police power. It doesn't. The police power originates outside the Constitution.

7. Did the Tenth Circuit Court of Appeals, relying upon its own and U.S. Supreme Court decisions, effectively abolish the federal 4th Amendment?

There is a rule celebrities have to learn: never believe your own press. Here the Tenth Circuit has violated that rule, for it loves its own clearly established law and then has counter-ruled it can affirm a prior decision by any other means. The Tenth Circuit violated its own prior holdings of *Medina v. City and County of Denver* and *United States v. Edwards*, both cited immediately above. Ignoring *Delaware v. Prouse*, cited above, it then chose U. S. Supreme Court decisions that are completely off point to make up arrestable offenses out of non-arrestable offenses. These troublesome Supreme Court cases relied upon by the Tenth Circuit are *Atwater v. City of Lago Vista*, 532 U.S. 318(2001) and United States v. Herbin, 343 F.3d 807, 810 (6th Cir. 2003) (Fourth Amendment does not prohibit custodial arrest for traffic violation even though not an arrestable offense under state law).

Atwater concludes (pages 349-350) that the Supreme Court has rejected the notion that the Fourth Amendment prohibits warrantless arrests for "fine only" offenses or traffic infractions. In *Atwater*, the arrestable offense was a seat belt violation, children not being strapped in. In *Apodaca v. City of Albequerque*, 3 F.3d 1286 (10th Cir. 2006), the

violation of speeding is a misdemeanor, and it's an arrestable offense. In Kansas, by legislative intent, infractions are not arrestable offenses.

The essential problem in using *Atwater v. City of Lago Vista* as a controlling case is that it has NOT BEEN cited correctly. The warrantless arrest of anyone violating the Texas misdemeanor statute is expressly authorized by statute, but the police may issue citations in lieu of arrest.

This cite proves the complete opposite of the defense's position that warrantless arrests outside the statutory authorizations don't violate the Fourth Amendment. *Atwater* definitely does not support that conclusion.

Apodaca never refers to traffic infractions at all. Those charges were speeding, fleeing and eluding, and reckless driving, and those are all arrestable misdemeanors.

In *Herbin*, so the opposition states, an officer can make a custodial arrest for a traffic violation even though the statute prohibits arrest. Again this is a deliberate misrepresentation of what *Herbin* resolved. Rather the 6th Circuit Court held that observation by narcotics agents of a vehicle running a red light justified stopping the vehicle, regardless of the agents' failure to issue a traffic ticket and their admitted subjective intent was to investigate for drug activity. The gist of *Herbin*, therefore, revolves around a motion to suppress evidence.

That has absolutely nothing to do with the case at bar.

Rather, *Herbin* observes: "In *Whren v. United States*, 517 U.S. 806, 812-813 (1996), the Supreme Court held that the legality of a traffic stop turns on the validity of the officer's objective explanation for making the stop, not on the subjective intentions of the officers in initiating the stop."

The Tenth Circuit then committed a huge error when it distorted the *Atwater* case in *Rucker v. Hampton*, 01-7022 (10th Cir. 2002): "Indeed, he [trooper Hampton] had probable cause to arrest Rucker for failure to keep to the right of a road in violation of Oklahoma Statute Annotated §11-301(a), which pursuant to O.S.A. §17-101(B), is a misdemeanor crime punishable by fine of up to five hundred dollars or by imprisonment for up to ten days. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) holding that the Constitution tolerates full custodial arrests for fine-only offenses.)"

Mrs. Atwater's offense was a statutorily-declared arrestable misdemeanor, not a statutorily-declared unarrestable infraction, as applies in Willie Brown's case.

That celebrities believing their own press releases is a tragedy waiting to happen is demonstrated here by the Tenth Circuit Court of Appeals distorting the statutory facts of *Atwater*, citing such distortion in

Rucker, then buying its own distortion back in this instant appeal.

Understand clearly the position of petitioner Brown. He does not and has not disputed that a routine traffic stop is constitutional. He does not claim the traffic infraction itself resulted in a custodial arrest. He disputes that changing over to a subjective non-event (a valid driver's license) in order to arrest is a violation of the 4th Amendment. If the Supreme Court permits such outright and outrageous lieing to convince the Tenth Circuit to affirm the prior summary judgments by any other means, then anyone can make up anything about any case and it's all good! The Tenth Circuit apparently doesn't read case law any more than it reads statutes. If it's decision prevails, the Tenth Circuit therefore sacrifices any integrity it tried to build up over all the years.

Even though these cases are astoundingly contrary to natural rights, there is a factual defect that negates all of them. Petitioner Willie Brown is not complaining of being arrested, booked, and charged with a headlight out. That's not why he was arrested. The deputy never said Brown was under arrest for having a headlight out. He was arrested for failing to provide a valid driver's license under a separate statute. While "pretexts" are the issues underlying *Atwater,* or *Apodaca*, or *Herbin,* no pretext is claimed by any party to this appeal. Indeed, as Brown has pointed out, lack of a driver's license should have been articulately suspected before pulling him over for a routine traffic stop, and that didn't happen.

Brown was not allowed to rebut the Court-ordered Response to Petition for Panel Rehearing. This is also a gross Tenth Circuit error.

Willie Brown was not arrested for an infraction. Not at all. All y'all are off point.

8. Is there no qualified immunity?

There is a presumption that government always acts within the law and is always right. The two officers defending in this appeal claim qualified immunity. That is a presumption only, and that is pierced by four proofs: absolute liability, probable cause, discretion within job scope, and that the law was not clearly established at the time of Brown's arrest.

A. Qualified immunity is a derivative of the absolute immunity doctrine introduced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Supreme Court decided that the absolute immunity Secret Service supervisor Fitzgerald was claiming only belonged to the President and his Cabinet, but more importantly, the one claiming it has to prove it. Qualified immunity is not just a passive defense. Here the deputy and the trooper have not met their burdens of proof, and Brown has overcome their argument.

B. The officer's opposing counsel has put the cart before the horse and thoroughly confounded the Tenth Circuit judges. Counsel makes the preposterous assertion that because Brown's arrest was justified by probable cause, they have qualified

immunity. We've seen nothing that shows a probable cause existed for either a headlight out or a valid driver's license. Again Brown has overcome their argument.

Thirdly, the officers argue they had discretion within their job scope. There is no statutory discretion to arrest for a headlight out and no statutory discretion to arrest for a valid driver's license. Both of these "crimes" exist only as creatures of statute. The officers' job scope incorporates these traffic statutes, which don't authorize arrests outside statutory creations in Kansas (K.S.A. 21-3102).

Lastly, the law was clearly established at the time of Brown's arrest, as has been discussed previously in point 5 above.

Conclusion: Willie Brown has overcome any and all assertions of qualified immunity by the defending parties, and they are not entitled to claims of qualified immunity.

WHEREFORE defendants lose on facts (evidence), procedure, and law.

Respectfully submitted,
Dated this 25th day of February 2008.

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Certificate of Service

The undersigned hereby certifies three true and correct copies of the foregoing plaintiff's Petition for Writ of Certiorari to the U.S. Supreme Court was delivered by mail, delivered through the U.S. Postal Service, first class postage prepaid, deposited this day, addressed to the office of joint counsels J. Steven Pigg and Teresa L. Watson, at Fisher, Patterson, Sayler & Smith, LLP, 3559 SW 5th Street, P.O. Box 949, Topeka, KS 66601-0949, attorneys for appellees Scott Fisher and County of Miami, and three copies to the office of Brian D. Sheern, in the office of the Kansas Attorney General, Memorial Hall, 2nd Floor, 120 SW 10th Avenue, Topeka, KS, attorney for appellee J. J. Weber.

Dated this ___day of March 2008.

APPENDIX

PART 1: FEDERAL DISTRICT COURT ORDERS

PART 2: TENTH CIRCUIT APPELLATE ORDERS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIE BROWN, Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	Case No. 05-2268
SCOTT FISHER, J.J. WEBER AND MIAMI COUNTY, Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff brings this pro se civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendant arrested him without probable cause and detained him for nine hours in violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteen Amendments. This matter comes before the Court on plaintiff's Motion and Brief For Summary Judgment (Doc. #7) filed July 26, 2005. For reasons set forth below, the Court finds that plaintiff's motions should be overruled.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might effect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l. Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). The nonmoving party may not rest on its pleadings but must set forth specific facts. Id. at 1241.

The Court must view the record in a light most favorable to the parties opposing the motion for summary judgment. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51.

The Court affords a pro se plaintiff some leniency and must liberally construe the complaint. See Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While pro se complaints are held to less stringent standards than pleadings drafted by lawyers, pro se litigants must follow the same procedural rules as other litigants. See Hughes v. Rowe, 449 U.S. 5 (1980); Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992). The Court may not assume the role of advocate for a pro se litigant. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

In his motion for summary judgment plaintiff has failed to comply with D. Kan. Rule 56.1 regarding his statement of material facts. D. Kan. Rule 56.1 requires as follows:

> The memorandum or brief in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts to which the movant contends no genuine issue exist. The facts shall be numbered and shall refer with articularity to those portions of the record upon which movant relies.
>
> * * *
>
> All facts on which a motion ... is based shall be presented by affidavit, declaration under penalty of perjury, and/or relevant portions of pleadings, depositions, answers to interrogatories and responses to requests for admissions.

Plaintiff's statement of facts contains seven numbered paragraphs. Plaintiff set out facts "used in the complaint" and asserts that the facts are

uncontroverted by relying upon defendant Fisher's answer. Fisher's answer supports plaintiff's fact paragraph 1, which states that Fisher stopped plaintiff on a highway in Miami County, and paragraph 3, which states that Fisher wrote plaintiff a ticket for open container and failure to produce a driver's license. Plaintiff's five other number paragraphs (2 and 4 - 7) are dis-jointed and contain multiple facts. Further, as support for the facts in those paragraphs, plaintiff states that although Fisher denies those facts, the other defendants have not answered. As defendants point out, however, plaintiff has never served Miami County. Further, defendant Weber filed his answer with leave of court *after* plaintiff filed his motion for summary judgment. In any event, even if the facts set out in plaintiff's memorandum were uncontroverted, plaintiff has not shown that he is entitled to summary judgment on any of his claims.

IT IS THEREFORE ORDERED that plaintiff's Motion and Brief For Summary Judgment (Doc. #7) filed July 26, 2005 be and hereby is OVERRULED.

Dated this 8th day of December 2005 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIE BROWN, Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	Case No. 05-2268-KHV
SCOTT FISHER, J.J. WEBER AND MIAMI COUNTY, Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff brings this pro se civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendants arrested him without probable cause and detained him for nine hours in violation of his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteen Amendments. This matter comes before the Court on defendant Scott Fisher's Motion For Summary Judgment (Doc. #21) filed September 16, 2005, and defendant Joshua Weber's Motion For Summary Judgment (Doc. #25) filed September 19, 2005. For reasons set forth below, the Court finds that the defendants' motions should be sustained.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might effect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l. Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). The nonmoving party may not rest on its pleadings but must set forth specific facts. Id. at 1241.

The Court must view the record in a light most favorable to the parties opposing the motion for summary judgment. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 932 F.2d 1105, 1110 (10th Cir. 1991).

Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51.

The Court affords a *pro se* plaintiff some leniency and must liberally construe the complaint. See Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers, *pro se* litigants must follow the same procedural rules as other litigants. See Hughes v. Rowe, 449 U.S. 5 (1980); Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992). The Court may not assume the role of advocate for a *pro se* litigant. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

Factual Background

Summary judgment procedure is governed by D. Kan. Rule 56.1, which states that a memorandum or brief in support of a motion for summary judgment "shall begin with a section that contains a concise statement of material facts as to which the movant contends no genuine issue exists." It also requires that an opposing memorandum begin with a section that contains a "concise statement of material facts as to which the party contends a genuine issue exists." Each fact must be numbered and refer with particularity to those portions of the record upon which the party relies. Also, in responding, the non-moving party shall state the "number" of each of movant's facts that is disputed. All facts on which

either party relies must be organized by and contained within numbered paragraphs, and all operative facts must be captured within the parties' statement of uncontroverted facts and response thereto.

Plaintiff's opposition brief does not dispute any specific facts in defendants' memoranda. Furthermore, plaintiff does not specifically contradict defendants' factual assertion with reference to those portions of the record on which he relies. See D. Kan. Rule 56.1[1] The Court recognizes that *pro se* litigants should not succumb to summary judgment merely because they fail to comply with the technical requirements involved in defending such motion. See Woods v. Roberts, No. 94-3159, 1995 WL 65457, at *2 (10th Cir. Feb. 17, 1995); Hass v. U.S. Air Force, 848 F. Supp. 926, 929 (D. Kan. 1994). The Court has therefore searched the record to determine whether genuine issues of material fact preclude the entry of

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1 D. Kan. Rule 56.1 provides as follows:

(b) Opposing Memorandum

(1) A memorandum in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered by paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of movant's fact that is disputed.

(2) If the party opposing summary judgment relies on any facts not in movant's memorandum, that party shall set forth each additional fact in a separately numbered paragraph, supported by references to the record, in the manner required by subsection (a) above. All material facts set forth in this statement of the non-moving party shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the reply.

summary judgment for defendants. Where supported by the record, the Court has included plaintiff's additional facts and construed them in the light most favorable to plaintiff.

At 9:30 P.M. on February 25, 2004, Willie Brown was driving a pickup in Miami County, Kansas. Deputy Scott Fisher of the Miami County Sheriff's Office stopped Brown's truck because the passenger-side headlight was not illuminated. Brown immediately pulled over to the right. Fisher approached the truck and asked Brown for his driver's license. Brown asked Fisher what probable cause he had to stop him. Fisher told Brown that one of his headlights was out. Brown again asked to see Brown's driver's license. Brown asked if he was under arrest. Fisher told Brown that he was not under arrest, but that if he did not produce a driver's license, he would arrest him. Brown refused to provide his driver's license. Fisher then went back to his patrol car. As Fisher was walking toward his patrol car, plaintiff got out of his car to look behind his seat for his briefcase. Fisher turned and ordered Brown to get back inside his car. Brown complied, and Fisher went to his patrol car and called for backup.

Deputy Fisher returned to Brown's vehicle, where Brown was looking through his briefcase and trying to find his driver's license. Fisher told Brown that he was under arrest and told him to get out of his car. Fisher patted Brown down, handcuffed him behind his back and placed him in the patrol car.

Brown doesn't complain about how he was handcuffed or placed in the car.[2]

Fisher then returned to Brown's vehicle and asked the passenger to get out of the vehicle. Fisher picked up plaintiff's billfold from the open briefcase and returned to the patrol car. Fisher opened the billfold and found Brown's driver's license.

At that point, Trooper Joshua Weber arrived on the scene. Weber asked Brown about his driver's license, to which Brown responded, "Are we having curbside court?" Weber did not speak further with Brown, and had no physical contact with him. Weber then recovered an open beer can from the passenger compartment of Brown's truck and transported the can to the Miami County Jail.

The officers took Brown to the Miami County Jail, where Fisher asked Brown if he would post a $35 bond. Brown declined, stating that he had not committed any crime. Jailers then took Brown's photograph and fingerprints and booked him into jail. A jailer delivered Brown a citation. Brown was released from jail the next morning at 7:30 A.M.

Under 42 U.S.C. § 1983, plaintiff alleges that defendants violated his rights under the Fourth, Fifth, Eight, and Fourteenth Amendments of the United States Constitution. In particular, plaintiff alleges that defendants violated his Fourth

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[2] Fisher was polite during the entire stop and did not physically mistreat Brown.

Amendment rights when they arrested him without probable cause and searched his car. Although plaintiff also alleges in some conclusory fashion that defendants violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, the complaint alleges no facts which implicate those rights.

ANALYSIS

Defendants assert that they are entitled to qualified immunity on plaintiff's Fourth Amendment claim. "Government officials performing discretionary functions generally are shielded from liability for civil damages in so far as the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The affirmative defense of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Gross v. Pirtle, 245 F.3d 1151, 1155 (10th Cir. 2001) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). Once the defense has been raised, plaintiff has the burden to establish both the defendants' actions violated a constitutional or statutory right and that the right was "clearly established" at the time of the relevant conduct. See Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir. 2001). If plaintiff satisfies this two-part burden, defendant must demonstrate that his actions were objectively reasonable in light of the law and the information he possessed at the time. See Martin v. Bd. of County Comm'rs, 909 F.2d 402, 405 (10th Cir. 1990).

Defendants argue that plaintiff has not met his burden to show that his arrest on February 25, 2004, violated his Fourth Amendment right to be free from unreasonable searches and seizures. Under settled case law, a police officer may make a warrantless arrest if he has probable cause to believe that an individual has committed or is committing a crime. See Thompson v. City of Lawrence, Kansas, 58 F.3d 1511, 1515 (10th Cir. 1995); United States v. Maher, 919 F.2d 1482, 1485 (10th Cir. 1990). Probable cause exists if the arresting officer knows of facts and circumstances which are reasonably trustworthy and sufficient to lead a prudent person to believe that the individual has committed or is committing an offense. See Thompson, 58 F.3d at 1515. This determination must be made "in light of circumstances and facts as they would have appeared to a prudent, cautious, trained police officer. Maher, 919 F.2d at 1485-86.[3]

Here, defendants have presented evidence that Fisher stopped Brown's vehicle at 9:30 P.M. because

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[3] In civil rights cases which challenge the validity of warrantless arrest, the Tenth Circuit has noted that the question of probable cause is ordinarily one of fact for the jury:

> It is true that the issue of probable cause ordinarily is for the judge rather than the jury. That is because the issue usually arises in the context of a motion to suppress evidence, which the judge decides. But where the issue arises in a damage suit, it is ... a proper issue for a jury if there is room for a difference of opinion. The underlying issue in deciding whether the police had probable cause to do what they did is reasonableness, which is also the underlying issue in deciding negligence - a classic jury issue.

DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir. 1990). In this case, however, the material facts are undisputed and compel a finding in favor of the defendants.

he had observed that the passenger-side front headlamp was not working. This was a traffic infraction, which provides sufficient grounds to support the initial stop. See Kan. Stat. Ann. §§ 8-1705, 1728(a). Further, Brown does not dispute that he refused to produce his driver's license, in violation of Kan. Stat. Ann. § 8-244, which provides as follows:

> Every licensee shall have his or her driver's license in his or her immediate possession at all times when operating a motor vehicle, *and shall display the same, upon demand* of any officer of a court of competent jurisdiction or any peace officer, examiner or officer of the division of vehicles. However, no person charged with violating this section shall be convicted if such person produces in court or the office of the arresting officer a driver's license theretofore issued to such person and valid at the time of arrest.Kan. Stat. Ann. § 8-244 (emphasis added).

Kansas law authorizes arrests under several specified circumstances. Specifically Kan. Stat. Ann. § 22-2401 provides as follows:

> A law enforcement officer may arrest a person under any of the following circumstances: * * *
>
> (c) The officer has probable cause to believe that the person is committing or has committed:
>
> (1) A felony; or

(2) a misdemeanor, and the law enforcement officer has probable cause to believe that:

(A) The person will not be apprehended or evidence of the crime will be irretrievably lost unless the person is immediately arrested;

(B) the person may cause injury to self or others or damage to property unless immediately arrested; or

(C) the person has intentionally inflicted bodily harm to another person.

(D) Any crime except a traffic infraction or a cigarette or tobacco infraction, has been or is being committed by the person in the officer's view.

The Kansas law which requires a driver to display his driver's license, Kan. Stat. Ann. § 8-244, is not categorized as a "traffic infraction" under Kansas law. See Kan. Stat. Ann. § 21-3105(2); Kan. Stat. Ann. § 8-2118(c). Therefore, when plaintiff refused to produce his driver's license, Fisher had authority to arrest plaintiff because in his view, defendant had committed a crime, other than a traffic infraction. See Kan. Stat. Ann. § 22-2401(d).

In Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001), the Supreme Court held that "[i]f an

officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." In Atwater, an officer observed plaintiff driving without a seat belt restraining her or her children. The officer arrested her for violating the Tex. Transp. Code Ann. §545.413 (1999), which makes it a misdemeanor to drive or allow children to ride in a vehicle without wearing an available seatbelt. The Supreme Court found that the arrest satisfied constitutional requirements. Plaintiff did not dispute that the officer had probable cause to believe that she had committed a crime in his presence; she admitted that neither she nor her children were wearing seatbelts, as required by Texas law. The Court found that the officer was authorized to make a custodial arrest without balancing costs and benefits of determining whether plaintiff's arrest was in some sense necessary. The Atwater Court also noted that the arrest was not made in an "extraordinary manner, unusually harmful to [plaintiff's] privacy or ... physical interests." Id. (quoting Whren v. United States, 517 U.S. 806, 818 (1996).

The Court stated that above all else, whether a search or seizure is "extraordinary" turns above all else, on the manner in which it is executed. Id. The Court stated that plaintiff's arrest was surely humiliating, but it was no more harmful to privacy or physical interests than the normal custodial arrest. Plaintiff was handcuffed, placed in a squad car and taken to the local police station, where officers asked her to remove her shoes, jewelry, glasses, and to empty her pockets. Defendants then took her photograph and placed her in a cell, alone for about an hour.

Defendants then took plaintiff before a magistrate and released her on bond. The Court found that the arrest and booking were inconvenient and embarrassing to plaintiff, but not so extraordinary as to violate the Fourth Amendment. Id. at 348 (rejecting line between "jailable" and "fine-only offenses" because officer on street may not be able to differentiate the two.)

As in Atwater, the officer here had probable cause to believe that plaintiff had committed a crime, albeit a minor one. Plaintiff does not allege or cite any evidence that Fisher conducted the arrest in an extraordinary manner. The uncontroverted facts show that the arrest did not violate plaintiff's Fourth Amendment rights.

Plaintiff also alleges that the officers' search of the vehicle violated his Fourth Amendment rights. Defendants assert that the search of plaintiff's car did not violate the Fourth Amendment because it was a lawful search incident to arrest. This Court recently reviewed the standard for an automobile search incident to an arrest. See McCormick v. Hadl, No. 03-2630-KHV, 2005 WL 1799260 (D. Kan., June 28, 2005).

Law enforcement officers must ordinarily obtain a warrant, based on probable cause, before conducting a search. See New York v. Belton, 453 U.S. 454, 457 (1981). The Supreme Court has recognized an exception to this rule where officers conduct a warrantless search incident to a lawful arrest. See Chimel v. California, 395 U.S. 752, 762-63 (1969). In the context of a lawful arrest an occupant or recent occupant of an automobile, the Fourth

Amendment allows the officer to search the passenger compartment of a vehicle and examine the contents of any containers found within the passenger compartment as a contemporaneous incident of arrest. Belton, 453 U.S. at 460; see United States v. Franco, 981 F.2d 470, 473 (10th Cir. 1992) (discussing Belton in context of recent occupant). In Franco, the Tenth Circuit held that the search of defendant's automobile was incident to his arrest because defendant "exercised control over his vehicle and its contents at the time of the arrest and during the commission of the offense, and was its immediate occupant." Id. Belton is based on the rationale that the search prevents the arrestee from reaching for weapons or destructible evidence. See id. at 472.

In 2004, the Supreme Court further defined when officers may search an automobile incident to a lawful arrest. See Thornton v. United States, 541 U.S. 615 (2004). In Thornton, an officer followed defendant and determined that his license tags had been issued for a car model other than what he was driving. See id. at 618. Before the officer had an opportunity to pull him over, however, defendant parked and got out of his car. See id. The officer saw defendant get out the car, then parked his own car, accosted defendant and requested his driver's license. See id. Because defendant appeared nervous, the officer asked if he could pat him down. See id. In defendant's pockets, the officer found bags of marijuana and cocaine. See id. The officer handcuffed defendant, told him that he was under arrest and placed him in the back seat of the patrol car. The officer then searched the defendant's car and found a handgun under the driver's seat. See id.

The Fourth Circuit Court of Appeals noted defendant's concession that he was in "close proximity, both temporally and spatially," to his vehicle. It therefore found that the car was within his immediate control and that the search was reasonable under Belton. See id. at 2130. The Supreme Court affirmed. It first noted that Belton did not depend on whether the arrestee got out of the vehicle at the officer's direction or whether the officer initiated contact while defendant remained in the car. Id. at 2131. The Supreme Court reasoned that the stress and uncertainty of an arrest "is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle." Id. The Supreme Court emphasized that Belton applies to both "occupants" and "recent occupants" of a vehicle. It therefore concluded that even though not all contraband in the passenger compartment may be readily accessible to a recent occupant, "[t]he need for a clear rule ... justifies the sort of generalization which Belton enunciated." Id. at 2132. The Supreme Court held that "[o]nce an officer determines that there is probable cause to make an arrest [of a recent occupant of a vehicle], it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment." Id. It further held that "[s]o long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest." Id. An arresstee's status as a "recent

occupant" may turn on his temporal and spatial relationship to the car at the time of the arrest and search. Id. at 2131.

In this case, Fisher had probable cause to arrest plaintiff, who was a recent occupant of the vehicle. It was therefore reasonable for the officers to search the passenger compartment. Fisher and Weber are entitled to summary judgment on plaintiff's Fourth Amendment claims.

The Court notes that although plaintiff has sued Miami County, Kansas, he has not alleged that the County violated his rights through a county custom, practice, or policy or by the act of a final decision-maker. County liability under Section 1983 does not automatically spring from the acts of county employees. Pembaur v. City of Cinncinnati, 475 U.S. 469, 478 (1986), but results when the county itself causes the wrong. Such wrong may arise from official policy, e.g. "acts which the [county] has officially sanctioned or ordered," or from the act of an ultimate county decision-maker. Id. at 479-80. Plaintiff has not alleged any facts as to county policy or acts by county decision-makers. Plaintiff is therefore ordered to show cause in writing on or before March 10, 2006, why the Court should not dismiss his claims against Miami County.

IT IS THEREFORE ORDERED that defendant Scott Fisher's Motion For Summary Judgment (Doc. #21) filed September 16, 2005 and defendant Joshua Weber's Motion For Summary

Judgment (Doc. #25) filed September 19, 2005 be and hereby are SUSTAINED.

IT IS FURTHER ORDERED that plaintiff shall show cause in writing on or before March 10, 2006 why the Court should not dismiss his claims against Miami County.

Dated this 27th day of February, 2006 at Kansas City, Kansas.

/s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIE BROWN, Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	Case No. 05-2268
SCOTT FISHER, J.J. WEBER AND MIAMI COUNTY, Defendants.	)	

ORDER

Willie Brown, *pro se*, brings this civil rights action under 42 U.S.C. § 1983, alleging that defendants violated his constitutional rights. Complaint (Doc. #1) filed June 27, 2005. Specifically, plaintiff alleges that Scott Fisher and J. J. Weber arrested him without probable cause and detained him for nine hours in violation of his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteen Amendments. On February 27, 2006, this Court granted summary judgment in favor of Fisher and Weber. See Memorandum and Order (Doc. #40). The Court also ordered plaintiff to show cause in writing why it should not dismiss his claim against Miami County. This matter is before the Court on plaintiff's Reponse to Show Cause Order (Doc. #41) filed March 9, 2006.

In his response, plaintiff contends that Miami County is in default because it has not filed an answer in this case. As the Court noted in a previous order, however, plaintiff has never served summons or complaint upon Miami County. Therefore, under Rule 4(m), Fed.R.Civ.P., the Court may dismiss without prejudice plaintiff's claims against Miami County.[1] Fed. R. Civ. P. 4(m) (court "may dismiss the case if service of the summons and complaint is not made upon a defendant within 120 days after filing of the complaint").

IT IS THEREFORE ORDERED that plaintiff's claims against Miami County are dismissed without prejudice.

Dated this 9th day of May, 2006 at Kansas City, Kansas.

/s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

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[1] Alternatively, plaintiff asserts that he has a viable claim against Miami County because undersheriff Mark Schmidt had a duty to investigate whether the officers acted with probable cause. The Court has already concluded, however, that Fisher and Weber had probable cause to arrest plaintiff and search his car. Plaintiff still has not alleged any county policy or any action by Schmidt or any other County policymaker which violated his constitutional rights. Pembaur v.City of Cinncinnati, 475 U.S. 469, 479-80 (1986) (no respondeat superior liability under Section 1983; county liability rises from acts which county has officially sanctioned, or from act of ultimate county decision-maker).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIE BROWN, Plaintiff-Appellant, v. SCOTT FISHER; J.J. WEBER; COUNTY OF MIAMI, Defendants-Appellees.	No. 06-3207 D. Kan. (D. C. No. 05-CV-2268-KHV)

ORDER AND JUDGMENT*

Before **HENRY, BRISCOE,** and **O'BRIEN**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P.

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Willie Brown was stopped by a police officer for a minor traffic violation. He refused to present his driver's license and, as a result, was arrested and spent a night in jail. At some point, his vehicle was searched by another officer and an open beer can was discovered in the cab of his pick-up truck. Brown brought this case against the two officers, Scott Fisher and J.J. Weber, and the County of Miami, Kansas, claiming a violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. The district court allowed Weber to answer out of time, and then granted summary judgment in favor of Fisher and Weber. The district court dismissed Brown's claims against the County without prejudice for failure of service. Appearing *pro se*,[1] Brown appeals from these decisions. We dismiss in part, reverse in part, and affirm in part.

I. BACKGROUND

At 9:30 p.m. on February 25th, 2004, Miami County Deputy Sheriff Scott Fisher stopped Brown's truck because the passenger-side headlight was not

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[1] We liberally construe Brown's pleadings, on account of his *pro se* status, but we hold Brown to the same rules of procedure as other litigants. *See Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992).

illuminated.[2] Fisher approached Brown and asked to see his driver's license. In response, Brown asked Fisher whether he had probable cause for the stop. Fisher responded that one of Brown's headlights was out and again asked to see Brown's driver's license. Brown asked if he was under arrest. Fisher replied he was not under arrest, but would be if he did not produce a driver's license. Fisher walked back to his patrol car and Brown got out of his truck to look for his license. Fisher ordered Brown back in the truck and called for backup. When Fisher returned to Brown's truck, Brown was sitting in the driver's seat, looking in his briefcase for his license.

Fisher arrested Brown, frisked him, handcuffed him, and placed him in the patrol car. Fisher then went to Brown's truck and found Brown's billfold in the briefcase. He searched the billfold in Brown's presence and discovered Brown's valid Kansas driver's license. At this point, Deputy Sheriff J.J. Weber arrived on-scene. Fisher removed Brown from the patrol car and Weber questioned Brown about his driver's license. Thereafter, Fisher transported Brown to the police station, which took between fifteen and twenty minutes. While Brown was in transport, Weber searched Brown's truck and found an open, non-alcoholic beer can in the passenger area.

At the station, Brown was issued a citation for driving with an open alcoholic beverage container and

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[2] Though not relevant to the issues raised on appeal, there was a fourteen-year-old passenger riding with Brown at the time of the stop.

for failing to display a driver's license upon demand. Brown refused to post a $35.00 bond and spent the night in the Miami County Jail. Brown was released the next morning.[3]

On June 27, 2005, Brown filed a complaint against Fisher, Weber and Miami County under 42 U.S.C. §1983, alleging violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. Fisher answered Brown's complaint on July 18, 2005. On July 28, 2005, Weber filed a motion to answer out of time, claiming excusable neglect on account of defective service. The district court granted this motion on August 10, 2005, without opinion. Both Fisher and Weber then filed motions for summary

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[3] If Brown was convicted this action would be barred. *Heck v. Humphrey*, 512 U.S. 477 (1994). The record is equivocal on that score. Brown alleges, in Paragraph 7 of his Complaint, he "appeared as directed on the ticket on March 25, 2004, at 9 A.M. in the Miami County courthouse before Judge Richard M. Smith, talked to the judge, and left. No charges were filed or prosecuted." Fisher and Weber deny the allegations contained in this paragraph, claiming they lack sufficient information to form a belief as to their truth or falsity. (R. Vol. 1, Doc. 5 at 2; Doc. 11 at 2.) In his Motion for Summary Judgment, Officer Fisher claims, as an uncontested material fact: "Brown was booked into the jail at about 10:30 p.m. He was released the next morning at about 7:30 a.m. by Undersheriff Mark Schmidt. He had been given a citation while in his jail cell which was delivered by one of the jailers." (R. Vol. 1, Doc. 22 at 7.) Fisher does not include any facts relating to the ultimate outcome of the citation. Brown testified at his deposition that he was delivered a citation in his jail cell. (R. Vol. 1, Doc. 22 attach. at 44) He also testified he showed up in court and his case was not called. (*Id.* at 47.) He claimed he did not ask why his case was not called, and did not know whether the case was still pending. (*Id.* at 50.) Reading the record most charitably to Brown, we assume he was not convicted.

judgment on all claims, and the district court granted these motions on February 27, 2006. The court determined that the allegations in Brown's complaint implicated only the Fourth Amendment, and Fisher and Weber were entitled to judgment as a matter of law because neither the arrest nor the search violated Brown's Fourth Amendment rights. The court ordered Brown to appear and show cause as to why his claims against the County should not be dismissed, based on his failure to allege "the County violated his rights through a County custom, practice or policy or by the act of a final decision-maker." Brown argued the merits of his case against the County, but the court did not consider the merits. Instead it dismissed Brown's claims against the County without prejudice for failure of service.

On appeal, Brown argues the district court erred by: (1) allowing Weber to answer out of time; (2) granting summary judgment to Fisher and Weber; and (3) dismissing Brown's claims against the County. We first consider Brown's claims against the County, and then his claims against Fisher and Weber.

II. DISCUSSION

A. *The County of Miami*

Brown filed his complaint on June 27, 2005. On July 1, 2005, Brown's process server served a copy of the summons and complaint upon an employee of the Clerk of the District Court of Miami County, Kansas. On July 6, 2005, Brown filed a proof of service upon Miami County, based upon serving the

Clerk of the District Court. Brown never served the Miami County Clerk or any member of the governing body of Miami County.[4]

The district court dismissed Brown's claims against the County without prejudice because Brown failed to properly serve the summons and complaint upon the County within 120 days of filing as required by Rule 12(m) of the Federal Rules of Civil Procedure ("if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time ... "). While the court did not directly consider the merits of Brown's claims against the County, it did remark in a footnote that Brown had not alleged any policy or action by the county which violated his constitutional rights. On May 9, 2006, the district court entered a separate judgment, dismissing without prejudice Brown's claims against the County.

1. Jurisdiction

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[4] Pursuant to Rule 4(j)(2) of Federal Rules of Civil Procedure, service upon a state, municipal corporation or other governmental organization is effected by delivering a copy of the summons and complaint to its chief executive officer or by serving the summons and complaint "in the manner prescribed by the law of that state." Kansas law provides service upon a county is effected by serving one of the county commissioners, the county clerk, or the county treasurer. Kan. Stat. Ann. § 60-304(d)(1).

Before we consider the district court's dismissal of Brown's claims against the County, we must insure we have jurisdiction. Though neither party has raised a jurisdictional challenge, "we have an independent duty to examine our own jurisdiction." *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1274 (10th Cir. 2001). Under 28 U.S.C. § 1291, only "final decisions" are appealable. *See* 28 U.S.C. § 1291 ("the courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..."). The question, then, is whether a dismissal without prejudice for failure of service of process constitutes a final, appealable decision.

In *Amazon*, we explained "[a]lthough a dismissal without prejudice is usually not a final decision, where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." 273 F.3d at 1275. There, we held the district court's decision to decline supplemental jurisdiction and dismiss state claims without prejudice for refiling in state court effectively disposed of the entire action in federal courts and was thus ripe for review. *See id.* In *Moya v. Schollembarger*, we noted "a dismissal [ ] without prejudice does not necessarily make it non-final under Section 1291." 465 F.3d 444, 448 (10th Cir. 2006). We set forth three principles for determining whether an order of a district court is final and appealable. *Id.* at 450. The third principle is relevant here: "When the dismissal order expressly grants the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss

the complaint [not the entire action]; the dismissal is thus not a final decision." *Id.* at 451.

Here, it appears the district court did not intend to dismiss Brown's entire cause of action and finally dispose of his case. The court's order allowed Brown to re-file and properly serve his complaint upon the County. The court even indicated in a footnote what Brown might need to do to survive a motion to dismiss as to his claims against the County. Presumptively then, the order of dismissal was not final and appealable.[5] Though, as stated in *Moya*, a dismissal without prejudice is not necessarily non-final, it is here, where it invites a plaintiff to correct the procedural defect and re-file. We therefore dismiss this portion of Brown's appeal for lack of jurisdiction.[6]

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[5] This is not inconsistent with prior cases in which we reviewed orders of dismissal with prejudice for failure to comply with the Federal Rules of Procedure. See, e.g. Nasious v. Two Unknown B.I.C.E. Agents, 492 F.3d 1158, 1161 (10th Cir. 2007) (reviewing dismissal with prejudice under Fed. R. Civ. P. 41(b) for failure to comply with the pleading requirements contained in Fed. R. Civ. P. 8); Olsen v. Mapes, F.3d 1199, 1200 (10th Cir. 2003) (reviewing dismissal with prejudice under Fed. R. Civ. P. 41(b) for failure to effectuate service under Fed. R. Civ. P. 4(i)).

[6] Brown's claims against the County are subject to a two-year statute of limitations. See Wallace v. Kato, 127 S.Ct. 1091, 1094, reh'g denied, 127 S.Ct. 1020 (2007) (statute of limitations applicable to § 1983 actions is what state law provides for personal injury torts). The dismissal of Brown's claims against the County more than two years after his cause of action accrued does not convert the dismissal without prejudice into a *de facto* dismissal with prejudice because Brown could have taken advantage of Kansas's tolling rules and refiled his

B. *Fisher and Weber*

On July 28, 2005, Weber filed a motion to answer out of time, claiming excusable neglect on account of defective service. The district court granted Weber's motion without opinion, allowing Weber to file and serve his answer within five days of the date of the order. The court later granted Fisher and Weber's motions for Summary judgment, holding the defendants were entitled to judgment as a matter of law on Brown's claim for violation of his rights under the Fourth amendment (according to the court, the only viable claim) because fisher had probable cause to arrest Brown and it was therefore reasonable for Fisher and Weber to search the passenger compartment of Brown's vehicle.

1. Jurisdiction

We continue to examine our jurisdiction. *See Amazon,* 273 F.3d at 1274. Generally, "A party cannot obtain appellate jurisdiction where the district court has dismissed one claim without prejudice because the case has not been fully disposed of in the

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complaint. *See Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 926 F.2d 959, 962 (10th Cir. 1991) ("Limitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules.") (internal quotations and citation omitted); Kan. Stat. Ann. § 60-518 ("If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff ... may commence a new action within (6) months after such failure.").

lower court." *Jackson v. Volvo Trucks N. Am.., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006); *see also Catlin v. United States*, 324 U.S. 229 at 233 (1945), *superseded by statute*, 9 U.S.C. § 15 (generally, a decision is final under 28 U.S.C. § 1291 only when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). There is an exception to this general rule where the unadjudicated claims relate only to a defendant who was never served. Under this exception, an order finally disposing of the interests of all defendants who have been served is appealable because the unserved defendant was never made a proper party to the action. *See Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986). We find this exception to be applicable here.

In *Bristol*, we held the fact that two (of twenty-one) defendants were not considered in the district court's order and judgment "does not prevent the decision of the district court from being final." *Id.* We explained "[t]hese unserved defendants were made parties to this lawsuit. It was not necessary for the district court to enter an order dismissing them prior to its entry of the order and judgment." *Id.* (citations omitted). *Bristol* was cited by the Eleventh Circuit in *Insinga v. LaBella*, where it held when "final judgment has been entered as to all defendants who have been served with process and only unserved defendants remain, the district court's order may be considered final under U.S.C. § 1291 for purposes of perfecting an appeal." 817 F.2d 1469, 1469-70 (11th Cir. 1987) (citing cases from the Tenth, Ninth, Second and Third Circuits).

In *Federal Savings & Loan Insurance Corporation v. Tullos-pierremont,* the Fifth Circuit expanded upon this analysis. 894 F.2d 1469 (5th Cir. 1990). The issue before the court was whether an appeal was timely where the plaintiff did not appeal immediately after the district court granted summary judgment to one of eight defendants, but rather, appealed only after seeking the dismissal without prejudice as to four defendants who had never been served (the other three defendants had been dismissed for lack of personal jurisdiction early on in the case). *Id.*. at 1470-71. The court adopted a brightline rule: "where a judgment of dismissal is rendered as to all served defendants and only unserved, nonappearing defendants remain, the judgment is final, and therefore, appealable under section 1291, without a Rule 54(b) certificate." *Id.* at 1473. The court rejected a "further adjudication test" which would have meant a judgment of dismissal is only rendered final as to all served defendants if further adjudication as to the unserved defendants is unlikely. *Id.* The court reasoned the brightline rule provided a clearer rule for litigants, and cautioned the further adjudication test would "swallow the rule" because "in nearly every case [where no disposition has been made as to an unserved defendant] it is almost certain that at *some* time *some* further district court action will be taken in the case respecting the claim against that [unserved] defendant." *Id.*[7]

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[7] This case has been cited with approval, though not in this Circuit. *See, e.g. Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698, 700 (7th Cir. 2004).

While we decline to adopt the brightline rule, we hold the mere fact that there may be subsequent adjudication between Brown and the County does not prevent the judgments as to Fisher and Weber from being final. It would be a different case if Brown had voluntarily sought the dismissal of his claims against the County. We have previously held a plaintiff cannot voluntarily dismiss some of its claims without prejudice in order to make a non-voluntary dismissal with prejudice ripe for review. *See Cook v. Rocky Mountain Bank Note Co.*, 974 F. 2d 147, 148 (10th Cir. 1992); *Heimann v. Snead*, 133 F.3d 767, 769 (10th Cir. 1998). It would also be a different case if the alleged defect in service as to the County had not yet been adjudicated. *See Tullos-Pierremont*, 894 F.2d at 1474, n.5 (noting the case did not present, and the court did not speak to, a situation where all defendants were served, but the propriety of the service as to some was contested and either unresolved or sustained but without dismissal as to the contesting defendant). Because neither of these circumstances is presented here, we have jurisdiction to review the district court's orders allowing Weber to file his answer out of time and granting summary judgment in favor of Weber and Fisher.

2. Extension of Time to File an Answer

Brown contends the district court erred in permitting Weber to file his answer out of time, and should have instead granted default judgment against Weber based on his failure to answer. Under Rule 6(b) of the Federal Rules of Civil Procedure, the district court may permit the late filing of an answer if it finds the late filing resulted from "excusable neglect." We review a district court's decision

extending time to file for abuse of discretion. *Panis v. Mission Hills Bank,* N.A., 60 F.3d 1468, 1494 (10th Cir. 1995). Weber argued to the district court that he should be granted an extension of time because Brown improperly served an administrative assistant at a Kansas Highway Patrol office who was not authorized to receive service of process on his behalf. According to Weber, the delay resulting from the improper service constituted "excusable neglect." The district court did not abuse its discretion in allowing Weber to file out of time on this basis.

3. Summary Judgment

The district court granted summary judgment to Fisher and Weber, concluding they were entitled to qualified immunity because Brown did not establish a violation of his rights under the Fourth Amendment. According to the district court, Fisher had probable cause to arrest Brown, and it was reasonable for Fisher and Weber to search the passenger compartment of Brown's vehicle incident to the arrest.

We review a district court's grant of summary judgment de novo. *United States ex rel. Bahrani v. Conagra, Inc.,* 465 F.3d 1189, 1197 (10th Cir. 2006). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(c)). We review summary judgment orders deciding qualified immunity somewhat differently from other summary judgment decisions. *Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir. 2001). Where a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff, who must establish: (1) the defendant's actions

violated a constitutional or statutory right; and (2) the right at issue was clearly established at the time of the defendant's unlawful conduct. *Id.* If the plaintiff fails to meet this "heavy two-part burden," the defendant is entitled to qualified immunity. *Id.*

The district court correctly granted summary judgment to Fisher because his arrest of Brown was reasonable, as was his search of Brown's vehicle. However, the district court erred in granting summary judgment to Weber because his search of Brown's vehicle was not reasonable, as it was conducted while Brown was being transported by Fisher to the police station.

A. Arrest

"If an officer has probable cause to believe that an individual has committed even a minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista,* 532 U.s. 318, 354 (2001). "'The constitutionality of an arrest does not depend on the arresting officer's state of mind." *Apodaca v. City of Albuquerque,* 443 F.3d 1286, 1289 (10th Cir. 2006). "All that matters is whether [the officer] possessed knowledge of evidence that would provide probable cause to arrest [the defendant] on some ground," *Id.*

The district court concluded Fisher had probable cause to arrest Brown for failing to display his driver's license upon demand, in violation of state law. *See* Kan. Stat. Ann. § 8-244 ("Every licensee

shall have his or her driver's license in his or her immediate possession at all times when operating a motor vehicle, and shall display the same, upon demand of any . . . peace officer . . . ."). There are two difficulties with this conclusion. First, viewing the facts in the light most favorable to Brown, it is not clear that Brown refused to provide his license, as he testified he was looking for his license in his briefcase at the time of his arrest. Second, it is not clear that Fisher could detain Brown after finding Brown's valid license. We have held "[I]f the police learn information that destroys their probable cause to arrest a defendant, the arrest may become illegal." *United States v. Edwards*, 242 F.3d 928, 934 (10th Cir. 2001).

We need not resolve either of these difficulties, for we can affirm the district court on another basis supported in the record. *See Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1164 n.17 (10th Cir. 2004))"We may affirm on any basis supported by the record."). Brown does not dispute that he was driving with an inoperable headlight at nighttime at the time he was pulled over. This constitutes a violation of state law, and is a valid basis for his arrest. *See* Kan. Stat. Ann. 8-1703(a)(1) ("Every vehicle . . . upon a highway within this state, at all times shall display lighted head and other lamps . . . . :[f]rom sunset to sunrise"). Because Brown cannot establish that Fisher violated his constitutional rights in arresting him, Fisher is entitled to qualified immunity on Brown's claim for unlawful arrest.

B. The Search of Brown's Vehicle

While a search conducted without a warrant is usually per se unreasonable, warrantless searches are permissible under certain "well-delineated exceptions." *United States v. Franco*, 981 F.2d 470, 472 (10th Cir. 1992). For example, a warrant is not required for a search "incident to an arrest."[8] *Id.* In *New York v. Belton*, the Supreme Court held "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. 454, 460 (1981). The rationale for this exception is the search prevents the arrestee from reaching for weapons or destuctible evidence. *See Chimel v. California*, 395 U.S. 752, 764 (1969).

In *United States v. Lugo*, we discussed the rationale of *Belton* and *Chimel*, and held a warrantless search incident to an arrest if not valid if remote in time or place from the arrest. 978 F. 2d 631, 634-45 (10th Cir. 1992). Thus, we concluded the search of the arrestee's passenger compartment was unlawful because it began after the suspect was arrested, removed from the scene, and en route to the police station. *Id. at 635.*

In 2004, the Supreme Court further defined when officers may search an automobile incident to a lawful arrest. *See Thornton v. United States*, 541 U.S. 615 (204). In *Thornton*, the officer saw the defendant get out of his car, then approached the

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[8] It was not argued that Weber conducted and inventory seach.

defendant on foot and asked for his driver's license. *Id.* at 618. The officer patted down the defendant, and found marijuana and cocaine in his pockets. *Id.* The officer arrested the defendant, handcuffed him, and placed him in the backseat of his patrol car. *Id.* The Fifth Circuit found the search to be reasonable under *Belton* because the defendant's car was in his immediate control. *Id.* at 619. The Supreme Court affirmed, holding "[s]o long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to arrest." *Id.* at 623-24.

Reading *Belton, Lugo, and Thornton* together, we have held that a warrantless search can be lawful incident of an arrest where the arrestee is detained on-scene at the time of the search. *See United States v. Brothers,* 438 F.3d 1068, 1070, 1073 (10th Cir.) (holding a search conducted "two to three minutes after the defendant had been handcuffed and his pockets searched" was "valid as a search incident to a custodial arrest"), *cert. denied,* 126 S. Ct. 2946 (2006); *see also United States v. Martinez,* 30 Fed. Appx. 900, 903-04 (10th Cir. 2002) (unpublished))holding a search conducted after the defendant was arrested and placed in the back of the police car was valid as a search incident to arrest).[9] However, we have not upheld a search as a lawful incident of an arrest where the arrestee is in a patrol car enroute to

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[9] Unpublished Orders and Judgments are not precedential. We mention *Martinez* as we would an opinion from another circuit. It is persuasive only to the extent of its reasoned analysis. *See* 10th Cir. App. P. 21.1(A).

the police station at the time the search begins. In *United States v. Dennison,* we held we could not determine whether a search was incident to a lawful arrest because the district court had not made a finding as to the arrestee's location when the search began. 410 F.3d 1203, 1210 (10th Cir.) *cert. denied,* 546 U.S. 955 (2005).

Here, the district court cited *Belton* and *Thornton,* but not *Lugo.* Of more concern, the district court did not distinguish between Fisher's search of Brown's vehicle and Weber's search of Brown's vehicle. The court stated: "Fisher had probable cause to arrest plaintiff, who was a recent occupant of the vehicle. It was therefore reasonable for the officers to search the passenger compartment." (R. Vol. I. Soc. 40 at 11.) The court's conclusion in this regard glosses over the fact that the two searches were not contemporaneous. Fisher searched Brown's vehicle immediately after placing Brown in his patrol car, in order to retrieve Brown's billfold. Weber, on the other hand, did not search Brown's vehicle until after Fisher and Brown had left the scene.[10] Thus, viewing the disputed facts in the light most favorable to Brown, Fisher's search was incident to a lawful arrest, under *Brothers,* while Weber's was not, under *Lugo.*

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[10] This is a disputed fact-Weber argues he did not search Brown's vehicle, but saw the beer can in plain view from outside the truck. Weber did not argue, either in the district court or on appeal, that his search was an inventory search or that the beer can would have been the subject of inevitable discovery, though these appear to be reasonable arguments.

In order to defeat Weber's qualified immunity, Brown must establish not only that Weber's actions violated his Constitutional rights, he must also demonstrate that the right at issue (here, to be free from an unreasonable search) was clearly established at the time of the defendants' unlawful conduct. *See Medina,* 252 f.3d at 11 28. "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Walker v. City of Orem,* 451 f. 3d 1189, 1151 (10th Cir. 2006) (quoting *Medina v. City & County of Denver,* 960 F.2d 1493, 1498 (10th Cir. 1992)). The law regarding the validity of a search conducted when the arrestee is being transported to a police station was "clearly established" by *Lugo,* decided in 1992. Thus, Weber is not entitled to summary judgment based on qualified immunity on Brown's unreasonable search claim.

We **DISMISS** Brown's appeal of the dismissal of his claims against the County for lack of jurisdiction, **REVERSE** the grant of summary judgment to Weber and **REMAND** for proceedings consistent with this order and judgment, as to Fisher's qualified immunity, the district court's judgment is **AFFIRMED.**

ENTERED FOR THE COURT
Terrence L. O'Brien
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIE BROWN, Plaintiff-Appellant, v. SCOTT FISHER; J.J. WEBER; COUNTY OF MIAMI, Defendants-Appellees.	No. 06-3207

ORDER
Filed November 21, 2007

Before **HENRY, BRISCOE,** and **O'BRIEN**, Circuit Judges.

Within 14 days of the date of this Order the Appellees are directed to file a response to the Petition For Rehearing. In their response, the Appellees should address the following questions: (1) whether, in light of Kan. Stat. Ann. § 22-2401(d), Officer Fisher and Officer Weber were authorized to arrest Mr. Brown for having an inoperable headlight; (2) if not, whether a lack of authority to arrest Mr. Brown under Kansas law renders his arrest unreasonable under the Fourth Amendment; (3) whether assuming that the officers violated Mr.

Brown's Fourth Amendment rights by arresting him without the authority to do so under state law, they are nevertheless entitled to qualified immunity because the Fourth Amendment law applicable to this case is not clearly established.

Entered for the Court
/s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIE BROWN, Plaintiff-Appellant, v. SCOTT FISHER; J.J. WEBER; COUNTY OF MIAMI, Defendants-Appellees.	No. 06-3207

ORDER ON PETITION FOR REHEARING
Filed January 2, 2008

Before **HENRY, BRISCOE,** and **O'BRIEN,** Circuit Judges.

This matter is before the court on the petition for panel rehearing filed by Willie Brown on October 26, 2007. His petition contains nothing that would change the disposition of this appeal, but it raised an issue that warrants additional discussion.

Upon consideration, we grant the petition in part, withdraw the Order and Judgment issued on October 16, 2007, and substitute the attached Order and Judgment and concurrence. Apart from the

changes reflected in the substituted Order and Judgment, the petition for rehearing is denied.

Entered for the Court
/s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIE BROWN, Plaintiff-Appellant, v. SCOTT FISHER; J.J. WEBER; COUNTY OF MIAMI, Defendants-Appellees.	No. 06-3207 D. Kan. (D. C. No. 05-CV-2268-KHV)

ORDER AND JUDGMENT*

Before **HENRY, BRISCOE,** and **O'BRIEN**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Willie Brown was stopped by a police officer for a minor traffic violation. He refused to present his driver's license and, as a result, was arrested and spent a night in jail. At some point, his vehicle was searched by another officer and an open beer can was discovered in the cab of his pick-up truck. Brown brought this case against the two officers, Scott Fisher and J.J. Weber, and the County of Miami, Kansas, claiming a violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. The district court allowed Weber to answer out of time, and then granted summary judgment in favor of Fisher and Weber. The district court dismissed Brown's claims against the County without prejudice for failure of service. Appearing *pro se*,[1] Brown appeals from these decisions. We dismiss in part, reverse in part, and affirm in part.

I. BACKGROUND

At 9:30 p.m. on February 25th, 2004, Miami County Deputy Sheriff Scott Fisher stopped Brown's truck because the passenger-side headlight was not illuminated.[2] Fisher approached Brown and asked to

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[1] We liberally construe Brown's pleadings, on account of his *pro se* status, but we hold Brown to the same rules of procedure as other litigants. *See Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992).

[2] Though not relevant to the issues raised on appeal, there was a fourteen-year-old passenger riding with Brown at the time of the stop.

see his driver's license. In response, Brown asked Fisher whether he had probable cause for the stop. Fisher responded that one of Brown's headlights was out and again asked to see Brown's driver's license. Brown asked if he was under arrest. Fisher replied he was not under arrest, but would be if he did not produce a driver's license. Fisher walked back to his patrol car and Brown got out of his truck to look for his license. Fisher ordered Brown back in the truck and called for backup. When Fisher returned to Brown's truck, Brown was sitting in the driver's seat, looking in his briefcase for his license.

Fisher arrested Brown, frisked him, handcuffed him, and placed him in the patrol car. Fisher then went to Brown's truck and found Brown's billfold in the briefcase. He searched the billfold in Brown's presence and discovered Brown's valid Kansas driver's license. At this point, Deputy Sheriff J.J. Weber arrived on-scene. Fisher removed Brown from the patrol car and Weber questioned Brown about his driver's license. Thereafter, Fisher transported Brown to the police station, which took between fifteen and twenty minutes. While Brown was in transport, Weber searched Brown's truck and found an open, non-alcoholic beer can in the passenger area.

At the station, Brown was issued a citation for driving with an open alcoholic beverage container and for failing to display a driver's license upon demand. Brown refused to post a $35.00 bond and spent the

night in the Miami County Jail. Brown was released the next morning.[3]

On June 27, 2005, Brown filed a complaint against Fisher, Weber and Miami County under 42 U.S.C. §1983, alleging violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. Fisher answered Brown's complaint on July 18, 2005. On July 28, 2005, Weber filed a motion to answer out of time, claiming excusable neglect on account of defective service. The district court granted this motion on August 10, 2005, without opinion. Both Fisher and Weber then filed motions for summary judgment on all claims, and the district court granted these motions on February 27, 2006. The court

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[3] If Brown was convicted this action would be barred. *Heck v. Humphrey*, 512 U.S. 477 (1994). The record is equivocal on that score. Brown alleges, in Paragraph 7 of his Complaint, he "appeared as directed on the ticket on March 25, 2004, at 9 A.M. in the Miami County courthouse before Judge Richard M. Smith, talked to the judge, and left. No charges were filed or prosecuted." Fisher and Weber deny the allegations contained in this paragraph, claiming they lack sufficient information to form a belief as to their truth or falsity. (R. Vol. 1, Doc. 5 at 2; Doc. 11 at 2.) In his Motion for Summary Judgment, Officer Fisher claims, as an uncontested material fact: "Brown was booked into the jail at about 10:30 p.m. He was released the next morning at about 7:30 a.m. by Undersheriff Mark Schmidt. He had been given a citation while in his jail cell which was delivered by one of the jailers." (R. Vol. 1, Doc. 22 at 7.) Fisher does not include any facts relating to the ultimate outcome of the citation. Brown testified at his deposition that he was delivered a citation in his jail cell. (R. Vol. 1, Doc. 22 attach. at 44) He also testified he showed up in court and his case was not called. (*Id.* at 47.) He claimed he did not ask why his case was not called, and did not know whether the case was still pending. (*Id.* at 50.) Reading the record most charitably to Brown, we assume he was not convicted.

determined that the allegations in Brown's complaint implicated only the Fourth Amendment, and Fisher and Weber were entitled to judgment as a matter of law because neither the arrest nor the search violated Brown's Fourth Amendment rights. The court ordered Brown to appear and show cause as to why his claims against the County should not be dismissed, based on his failure to allege "the County violated his rights through a County custom, practice or policy or by the act of a final decision-maker." Brown argued the merits of his case against the County, but the court did not consider the merits. Instead it dismissed Brown's claims against the County without prejudice for failure of service.

On appeal, Brown argues the district court erred by: (1) allowing Weber to answer out of time; (2) granting summary judgment to Fisher and Weber; and (3) dismissing Brown's claims against the County. We first consider Brown's claims against the County, and then his claims against Fisher and Weber.

II. DISCUSSION

A. *The County of Miami*

Brown filed his complaint on June 27, 2005. On July 1, 2005, Brown's process server served a copy of the summons and complaint upon an employee of the Clerk of the District Court of Miami County, Kansas. On July 6, 2005, Brown filed a proof of service upon Miami County, based upon serving the

Clerk of the District Court. Brown never served the Miami County Clerk or any member of the governing body of Miami County.[4]

The district court dismissed Brown's claims against the County without prejudice because Brown failed to properly serve the summons and complaint upon the County within 120 days of filing as required by Rule 12(m) of the Federal Rules of Civil Procedure ("if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time ... "). While the court did not directly consider the merits of Brown's claims against the County, it did remark in a footnote that Brown had not alleged any policy or action by the county which violated his constitutional rights. On May 9, 2006, the district court entered a separate judgment, dismissing without prejudice Brown's claims against the County.

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[4] Pursuant to Rule 4(j)(2) of Federal Rules of Civil Procedure, service upon a state, municipal corporation or other governmental organization is effected by delivering a copy of the summons and complaint to its chief executive officer or by serving the summons and complaint "in the manner prescribed by the law of that state." Kansas law provides service upon a county is effected by serving one of the county commissioners, the county clerk, or the county treasurer. Kan. Stat. Ann. § 60-304(d)(1).

1. Jurisdiction

Before we consider the district court's dismissal of Brown's claims against the County, we must insure we have jurisdiction. Though neither party has raised a jurisdictional challenge, "we have an independent duty to examine our own jurisdiction." *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1274 (10th Cir. 2001). Under 28 U.S.C. § 1291, only "final decisions" are appealable. *See* 28 U.S.C. § 1291 ("the courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..."). The question, then, is whether a dismissal without prejudice for failure of service of process constitutes a final, appealable decision.

In *Amazon*, we explained "[a]lthough a dismissal without prejudice is usually not a final decision, where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." 273 F.3d at 1275. There, we held the district court's decision to decline supplemental jurisdiction and dismiss state claims without prejudice for refiling in state court effectively disposed of the entire action in federal courts and was thus ripe for review. *See id.* In *Moya v. Schollembarger*, we noted "a dismissal [ ] without prejudice does not necessarily make it non-final under Section 1291." 465 F.3d 444, 448 (10th Cir. 2006). We set forth three principles for determining whether an order of a district court is final and appealable. *Id.* at 450. The third principle is relevant here: "When the dismissal order expressly

grants the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss the complaint [not the entire action]; the dismissal is thus not a final decision." *Id.* at 451.

Here, it appears the district court did not intend to dismiss Brown's entire cause of action and finally dispose of his case. The court's order allowed Brown to re-file and properly serve his complaint upon the County. The court even indicated in a footnote what Brown might need to do to survive a motion to dismiss as to his claims against the County. Presumptively then, the order of dismissal was not final and appealable.[5] Though, as stated in *Moya*, a dismissal without prejudice is not necessarily non-final, it is here, where it invites a plaintiff to correct the procedural defect and re-file. We therefore dismiss this portion of Brown's appeal for lack of jurisdiction.[6]

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[5] This is not inconsistent with prior cases in which we reviewed orders of dismissal *with prejudice* for failure to comply with the Federal Rules of Procedure. *See, e.g. Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161 (10th Cir. 2007) (reviewing dismissal with prejudice under Fed. R. Civ. P. 41(b) for failure to comply with the pleading requirements contained in Fed. R. Civ. P. 8); *Olsen v. Mapes*, F.3d 1199, 1200 (10th Cir. 2003) (reviewing dismissal with prejudice under Fed. R. Civ. P. 41(b) for failure to effectuate service under Fed. R. Civ. P. 4(i)).

[6] Brown's claims against the County are subject to a two-year statute of limitations. *See Wallace v. Kato*, 127 S.Ct. 1091, 1094, *reh'g denied*, 127 S.Ct. 1020 (2007) (statute of limitations applicable to § 1983 actions is what state law provides for personal injury torts). The dismissal of Brown's claims against the County more than two years after his cause of action

B. *Fisher and Weber*

On July 28, 2005, Weber filed a motion to answer out of time, claiming excusable neglect on account of defective service. The district court granted Weber's motion without opinion, allowing Weber to file and serve his answer within five days of the date of the order. The court later granted Fisher and Weber's motions for Summary judgment, holding the defendants were entitled to judgment as a matter of law on Brown's claim for violation of his rights under the Fourth amendment (according to the court, the only viable claim) because fisher had probable cause to arrest Brown and it was therefore reasonable for Fisher and Weber to search the passenger compartment of Brown's vehicle.

1. Jurisdiction

We continue to examine our jurisdiction. *See Amazon,* 273 F.3d at 1274. Generally, "A party

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accrued does not convert the dismissal without prejudice into a *de facto* dismissal with prejudice because Brown could have taken advantage of Kansas's tolling rules and refiled his complaint. *See Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 926 F.2d 959, 962 (10th Cir. 1991) ("Limitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules.") (internal quotations and citation omitted); Kan. Stat. Ann. § 60-518 ("If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff ... may commence a new action within (6) months after such failure.").

cannot obtain appellate jurisdiction where the district court has dismissed one claim without prejudice because the case has not been fully disposed of in the lower court." *Jackson v. Volvo Trucks N. Am.., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006); *see also Catlin v. United States*, 324 U.S. 229 at 233 (1945), *superseded by statute*, 9 U.S.C. § 15 (generally, a decision is final under 28 U.S.C. § 1291 only when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). There is an exception to this general rule where the unadjudicated claims relate only to a defendant who was never served. Under this exception, an order finally disposing of the interests of all defendants who have been served is appealable because the unserved defendant was never made a proper party to the action. *See Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986). We find this exception to be applicable here.

In *Bristol*, we held the fact that two (of twenty-one) defendants were not considered in the district court's order and judgment "does not prevent the decision of the district court from being final." *Id.* We explained "[t]hese unserved defendants were made parties to this lawsuit. It was not necessary for the district court to enter an order dismissing them prior to its entry of the order and judgment." *Id.* (citations omitted). *Bristol* was cited by the Eleventh Circuit in *Insinga v. LaBella*, where it held when "final judgment has been entered as to all defendants who have been served with process and only unserved defendants remain, the district court's order may be considered final under U.S.C. § 1291 for purposes of

perfecting an appeal." 817 F.2d 1469, 1469-70 (11th Cir. 1987) (citing cases from the Tenth, Ninth, Second and Third Circuits).

In *Federal Savings & Loan Insurance Corporation v. Tullos-pierremont,* the Fifth Circuit expanded upon this analysis. 894 F.2d 1469 (5th Cir. 1990). The issue before the court was whether an appeal was timely where the plaintiff did not appeal immediately after the district court granted summary judgment to one of eight defendants, but rather, appealed only after seeking the dismissal without prejudice as to four defendants who had never been served (the other three defendants had been dismissed for lack of personal jurisdiction early on in the case). *Id.* at 1470-71. The court adopted a brightline rule: "where a judgment of dismissal is rendered as to all served defendants and only unserved, nonappearing defendants remain, the judgment is final, and therefore, appealable under section 1291, without a Rule 54(b) certificate." *Id.* at 1473. The court rejected a "further adjudication test" which would have meant a judgment of dismissal is only rendered final as to all served defendants if further adjudication as to the unserved defendants is unlikely. *Id.* The court reasoned the brightline rule provided a clearer rule for litigants, and cautioned the further adjudication test would "swallow the rule" because "in nearly every case [where no disposition has been made as to an unserved defendant] it is almost certain that at *some* time *some* further district

court action will be taken in the case respecting the claim against that [unserved] defendant." *Id.*[7]

While we decline to adopt the brightline rule, we hold the mere fact that there may be subsequent adjudication between Brown and the County does not prevent the judgments as to Fisher and Weber from being final. It would be a different case if Brown had voluntarily sought the dismissal of his claims against the County. We have previously held a plaintiff cannot voluntarily dismiss some of its claims without prejudice in order to make a non-voluntary dismissal with prejudice ripe for review. *See Cook v. Rocky Mountain Bank Note Co.,* 974 F. 2d 147, 148 (10th Cir. 1992); *Heimann v. Snead,* 133 F.3d 767, 769 (10th Cir. 1998). It would also be a different case if the alleged defect in service as to the County had not yet been adjudicated. *See Tullos-Pierremont,* 894 F.2d at 1474, n.5 (noting the case did not present, and the court did not speak to, a situation where all defendants were served, but the propriety of the service as to some was contested and either unresolved or sustained but without dismissal as to the contesting defendant). Because neither of these circumstances is presented here, we have jurisdiction to review the district court's orders allowing Weber to file his answer out of time and granting summary judgment in favor of Weber and Fisher.

2. Extension of Time to File an Answer

Brown contends the district court erred in permitting Weber to file his answer out of time, and

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[7] This case has been cited with approval, though not in this Circuit. *See, e.g. Garwood Packaging, Inc. v. Allen & Co.,* 378 F.3d 698, 700 (7th Cir. 2004).

should have instead granted default judgment against Weber based on his failure to answer. Under Rule 6(b) of the Federal Rules of Civil Procedure, the district court may permit the late filing of an answer if it finds the late filing resulted from "excusable neglect." We review a district court's decision extending time to file for abuse of discretion. *Panis v. Mission Hills Bank*, N.A., 60 F.3d 1468, 1494 (10th Cir. 1995). Weber argued to the district court that he should be granted an extension of time because Brown improperly served an administrative assistant at a Kansas Highway Patrol office who was not authorized to receive service of process on his behalf. According to Weber, the delay resulting from the improper service constituted "excusable neglect." The district court did not abuse its discretion in allowing Weber to file out of time on this basis.

3. Summary Judgment

The district court granted summary judgment to Fisher and Weber, concluding they were entitled to qualified immunity because Brown did not establish a violation of his rights under the Fourth Amendment. According to the district court, Fisher had probable cause to arrest Brown, and it was reasonable for Fisher and Weber to search the passenger compartment of Brown's vehicle incident to the arrest.

We review a district court's grant of summary judgment de novo. *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1197 (10th Cir. 2006). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(c)). We review summary judgment

orders deciding qualified immunity somewhat differently from other summary judgment decisions. *Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir. 2001). Where a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff, who must establish: (1) the defendant's actions violated a constitutional or statutory right; and (2) the right at issue was clearly established at the time of the defendant's unlawful conduct. *Id.* If the plaintiff fails to meet this "heavy two-part burden," the defendant is entitled to qualified immunity. *Id.*

The district court correctly granted summary judgment to Fisher because his arrest of Brown was reasonable, as was his search of Brown's vehicle. However, the district court erred in granting summary judgment to Weber because his search of Brown's vehicle was not reasonable, as it was conducted while Brown was being transported by Fisher to the police station.

A. Arrest

"If an officer has probable cause to believe that an individual has committed even a minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista,* 532 U.s. 318, 354 (2001). "The constitutionality of an arrest does not depend on the arresting officer's state of mind." *Apodaca v. City of Albuquerque,* 443 F.3d 1286, 1289 (10th Cir. 2006). "All that matters is whether [the officer] possessed

knowledge of evidence that would provide probable cause to arrest [the defendant] on some ground," *Id.*

The district court concluded Fisher had probable cause to arrest Brown for failing to display his driver's license upon demand, in violation of state law. *See* Kan. Stat. Ann. § 8-244 ("Every licensee shall have his or her driver's license in his or her immediate possession at all times when operating a motor vehicle, and shall display the same, upon demand of any . . . peace officer . . . ."). There are two difficulties with this conclusion. First, viewing the facts in the light most favorable to Brown, it is not clear that Brown refused to provide his license, as he testified he was looking for his license in his briefcase at the time of his arrest. Second, it is not clear that Fisher could detain Brown after finding Brown's valid license. We have held "[I]f the police learn information that destroys their probable cause to arrest a defendant, the arrest may become illegal." *United States v. Edwards,* 242 F.3d 928, 934 (10th Cir. 2001).

We need not resolve either of these difficulties, for we can affirm the district court on another basis supported in the record. *See Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1164 n.17 (10th Cir. 2004) ("we may affirm on any basis supported by the record.") Brown does not dispute that he was driving with an inoperable headlight at nighttime at the time he was pulled over. This constitutes a violation of state law. *See* Kan. Stat. Ann. § 8-1728(a) (requiring at least two (2) lighted headlamps"); Kan. Stat. Ann. § 8-1703(a)(1) ("Every vehicle ... upon a highway within

this state, at all times shall display lighted head and other lamps ... : [f]rom sunset to sunrise"). Brown contends a traffic infraction is not sufficient to establish probable cause for an arrest, because it is not an arrestable offense under Kansas law. *See* Kan. Stat. Ann. § 22-2401(d), ("[a] law enforcement officer may arrest a person ... [where] [a]ny crime, except a traffic infraction ... has been or is being committed by the person in the officer's view.") Brown is incorrect.

In *Atwater*, a person may arrest an individual without violating the Fourth Amendment so long as he has "probable cause to believe that an individual has committed even a minor criminal offense in his presence." 532 U.S. at 354[8]. A traffic infraction is a crime under Kansas law. *See* Kan. Stat. Ann. § 21-3105 ("A crime is an act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine, is authorized, or in the case of a traffic infraction ... a fine is authorized ...") *City of Prairie Village v. Eddy*, 789 P.2d 66, 67 (Kan. Ct. App. 1990) (holding trial court erred in concluding a traffic infraction was not a crime because the Kansas legislature amended Kan. Stat. §21-3105 in 1984 to "include traffic infractions in the definition of crime.")

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[8] The issue in *Atwater* was "whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine." 532 U.S. at 323. Under Texas law, a seatbelt violation is an arrestable offense, though punishable only by a fine. *See id.*

Our case law suggests an arrest does not violate the Fourth Amendment when the arresting officer is within his jurisdiction and has probable cause to believe a crime has occurred, even if the crime is not one for which arrest is authorized under state law.[9] In *United States v. Green*, we stated "It is

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[9] We recognize there is authority to the contrary. *See Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004) (noting that the Circuits are divided on the issue of "whether an arresting officer's lack of authority under state or federal law to conduct an otherwise constitutionally valid arrest constitutes an unreasonable seizure under the Fourth Amendment.") *Compare United States v. Becerra-Garcia*, 397 F.3d 1167, 1173 (9th Cir. 2005) (holding "the reasonableness of a seizure depends exclusively on federal law" and noting "the well-established proposition that an arrest in violation of state law may still be constitutionally reasonable"); *United States v. Wright*, 16 F.3d 1429, 1437 (6th Cir. 1994) ("the appropriate inquiry for a federal court considering a motion to suppress evidence seized by state officers is whether the arrest ... violated the Fourth Amendment. The fact that the arrest ... may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended."); *United States v. Walker*, 960 F.2d 409, 416 (5th Cir. 1992) ("in determining whether to suppress the evidence at issue, the inquiry is whether the officers had probable cause to arrest [the defendant]); *with Cole v. Neb. State Bd. of Parole*, 977 F.2d 442, 444 (8th Cir. 1993) ("An arrest by a state actor that is not authorized under state law is actionable under § 1983 as a seizure contrary to the Fourth Amendment."); *Malone v. County of Suffolk*, 968 F.2d 1480, 1482-83 (2nd Cir. 1992) (whether officers have valid authority to arrest pursuant to state law affects constitutionality of arrest); *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989) ("the reasonableness of an arrest depends upon the existence of two objective factors. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer

... well established in this circuit that in federal prosecutions the test of reasonableness in relation to the Fourth Amendment protected rights must be determined by Federal law even though the police actions are those of state police officers." 178 F.3d 1099, 1105 (10th Cir. 1999) (quotations omitted); *see also United States v. Le*, 178 F.3d 1258, 1264 (10th Cir. 1999) (same). In other words, although "the question of compliance with state law may well be relevant in determining whether police conduct was reasonable for Fourth Amendment purposes," a "violation of state law is not, without more, necessarily a federal constitutional violation." *United States v. Mikulski*, 317 F.3d 1228, 1232 (10th Cir. 2003) (quotations omitted).

In *Wilder v. Turner*, we considered "whether an officer has probable cause to arrest a driver that refuses to submit to a roadside sobriety test after the officer observes certain indicia of alcohol consumption." 490 F.3d 810, 811 (10th Cir. 2007). The district court has concluded the arrest violated the Fourth Amendment, "[d]eriving the legal framework for its probable cause determination exclusively from Colorado case law." *Id.* at 813. We reversed, reasoning:

[A] violation of state law cannot give rise to a claim under Section 1983. Section 1983 does not ... provide a basis for redressing violations of *state law*, but only for those violations of *federal law* done under color of state law. While it is true that state

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authorized by state and or municipal law to effect a custodial arrest for the particular offense.")

law with respect to arrest is looked to for guidance as to the validity of the arrest since the officers are subject to those local standards, it does not follow that state law governs.

Id. at 814 (quotations and citations omitted). Similarly, in *Apodaca*, we noted "there is no Fourth Amendment impediment to ... arrest" where the police officer had probable cause to arrest for a misdemeanor, even though the misdemeanor was not an arrestable offense under state law. 443 F.3d at 1289, n.2.

The Eighth Circuit reached the same result in a factually similar case. *United States v. Bell*, 54 F.3d 502 (8th Cir. 1995). The defendant in *Bell* was stopped by two police officers for riding a bicycle without a headlight in violation of Iowa law. The officers arrested the defendant for the violation then conducted a search incident to the arrest, which revealed Bell was carrying cocaine in his shoe. The district court granted Bell's motion to suppress concluding Bell's arrest was unlawful under Iowa law because the Iowa statutes permit only a citation, not an arrest, for operating a bicycle without a helmet. The Eighth Circuit concluded the district court erred in looking to Iowa law to determine the lawfulness of Bell's arrest. The court explained: "[W]e do not think Fourth Amendment analysis requires reference to an arrest's legality under state law. An arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause." *Id.* at 504 (citations omitted).

The Third Circuit recently analyzed this same issue and reached the same result. *See United States v. Laville*, 480 F.3d 187 (3rd Cir. 2007). In Laville, the district court concluded that, when the officers arrested the defendant without a warrant, they had "[a]t most" probable cause to believe the defendant had entered the United States illegally in violation of 8 U.S.C. § 1325, which constitutes a misdemeanor. *Id.* at 191. Under Virgin Islands, law, a misdemeanor must be committed in the presence of an officer to justify a warrantless arrest. *Id.* The court granted Laville's motion to suppress his post-arrest statements, concluding he was arrested in violation of the Fourth Amendment because the crime of illegal entry was committed before the officers arrived. *Id.*

The Third Circuit reversed, holding "the unlawfulness of an arrest under state or local law does not make the arrest unreasonable per se under the Fourth Amendment; at most, the unlawfulness is a factor for federal courts to consider in evaluating the totality of the circumstances surrounding the arrest." *Id.* at 196. The court reasoned a per se rule could result in "fifty different constitutional standards of arrest, each one dictated by a repsective state's positive and decisioinal law...." *Id.* at 193. Moreover, such a rule "could well create disparity in the constitutionality of arrests performed by state and federal officers for the same offense within the same state or territory." *Id.* Thus, "the validity of an arrest under state law must never be confused or conflated with the Fourth Amendment concept of reasonableness ..." *Id.* at 192. In a footnote, the court noted "[o]ther courts of appeal are in accord."

Id. at 192, n.2 (citing cases from the Seventh, Eighth and Tenth Circuits).

Based on our precedent and in light of the reasoning of *Bell* and *Laville*, we hold Brown cannot establish that his Fourth Amendment rights were violated by Fisher's arrest. Though the arrest was not authorized under Kansas, law, Fisher had probable cause to believe a criminal offense - albeit a very minor one - had been committed in his presence. Thus, Fisher is entitled to qualified immunity on Brown's claim for unlawful arrest.

B. The Search of Brown's Vehicle

While a search conducted without a warrant is usually per se unreasonable, warrantless searches are permissible under certain "well-delineated exceptions." *United States v. Franco,* 981 F.2d 470, 472 (10th Cir. 1992). For example, a warrant is not required for a search "incident to an arrest."[10] *Id.* In *New York v. Belton,* the Supreme Court held "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. 454, 460 (1981). The rationale for this exception is the search prevents the arrestee from reaching for weapons or destuctible evidence. *See Chimel v. California,* 395 U.S. 752, 764 (1969).

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10 It was not argued Weber conducted an inventory search.

In *United States v. Lugo,* we discussed the rationale of *Belton* and *Chimel,* and held a warrantless search incident to an arrest if not valid if remote in time or place from the arrest. 978 F. 2d 631, 634-45 (10th Cir. 1992). Thus, we concluded the search of the arrestee's passenger compartment was unlawful because it began after the suspect was arrested, removed from the scene, and en route to the police station. *Id. at 635.*

In 2004, the Supreme Court further defined when officers may search an automobile incident to a lawful arrest. *See Thornton v. United States,* 541 U.S. 615 (204). In *Thornton,* the officer saw the defendant get out of his car, then approached the defendant on foot and asked for his driver's license. *Id.* at 618. The officer patted down the defendant, and found marijuana and cocaine in his pockets. *Id.* The officer arrested the defendant, handcuffed him, and placed him in the backseat of his patrol car. *Id.* The Fifth Circuit found the search to be reasonable under *Belton* because the defendant's car was in his control. *Id.* at 619. The Supreme Court affirmed, holding "[s]o long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to arrest." *Id.* at 623-24.

Reading *Belton, Lugo, and Thornton* together, we have held that a warrantless search can be lawful incident of an arrest where the arrestee is detained on-scene at the time of the search. *See United States v. Brothers,* 438 F.3d 1068, 1070, 1073 (10th Cir.)

(holding a search conducted "two to three minutes after the defendant had been handcuffed and his pockets searched" was "valid as a search incident to a custodial arrest"), *cert. denied,* 126 S. Ct. 2946 (2006); *see also United States v. Martinez,* 30 Fed. Appx. 900, 903-04 (10th Cir. 2002) (unpublished)) holding a search conducted after the defendant was arrested and placed in the back of the police car was valid as a search incident to arrest).[11] However, we have not upheld a search as a lawful incident of an arrest where the arrestee is in a patrol car enroute to the police station at the time the search begins. In *United States v. Dennison,* we held we could not determine whether a search was incident to a lawful arrest because the district court had not made a finding as to the arrestee's location when the search began. 410 F.3d 1203, 1210 (10th Cir.) *cert. denied,* 546 U.S. 955 (2005).

Here, the district court cited *Belton* and *Thornton,* but not *Lugo.* Of more concern, the district court did not distinguish between Fisher's search of Brown's vehicle and Weber's search of Brown's vehicle. The court stated: "Fisher had probable cause to arrest plaintiff, who was a recent occupant of the vehicle. It was therefore reasonable for the officers to search the passenger compartment." (R. Vol. I. Soc. 40 at 11.) The court's conclusion in this regard glosses over the fact that the

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[11] Unpublished Orders and Judgments are not precedential. We mention *Martinez* as we would an opinion from another circuit. It is persuasive only to the extent of its reasoned analysis. *See* 10th Cir. R. App. P. 21.1(A).

two searches were not contemporaneous. Fisher searched Brown's vehicle immediately after placing Brown in his patrol car, in order to retrieve Brown's billfold. Weber, on the other hand, did not search Brown's vehicle until after Fisher and Brown had left the scene.[12] Thus, viewing the disputed facts in the light most favorable to Brown, Fisher's search was incident to a lawful arrest, under *Brothers,* while Weber's was not, under *Lugo.*

In order to defeat Weber's qualified immunity, Brown must establish not only that Weber's actions violated his Constitutional rights, he must also demonstrate that the right at issue (here, to be free from an unreasonable search) was clearly established at the time of the defendants' unlawful conduct. *See Medina,* 252 f.3d at 11 28. "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Walker v. City of Orem,* 451 f. 3d 1189, 1151 (10th Cir. 2006) (quoting *Medina v. City & County of Denver,* 960 F.2d 1493, 1498 (10th Cir. 1992)). The law regarding the validity of a search conducted when the arrestee is being transported to a police station was "clearly established" by *Lugo,* decided in 1992. Thus, Weber is not entitled to

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[12] This is a disputed fact-Weber argues he did not search Brown's vehicle, but saw the beer can in plain view from outside the truck. Weber did not argue, either in the district court or on appeal, that his search was an inventory search or that the beer can would have been the subject of inevitable discovery, though these appear to be reasonable arguments.

summary judgment based on qualified immunity on Brown's unreasonable search claim.

We **DISMISS** Brown's appeal of the dismissal of his claims against the County for lack of jurisdiction, **REVERSE** the grant of summary judgment to Weber and **REMAND** for proceedings consistent with this order and judgment, as to Fisher's qualified immunity, the district court's judgment is **AFFIRMED.**

ENTERED FOR THE COURT
Terrence L. O'Brien
Circuit Judge

No. 06-3207, Brown v. Fisher

HENRY, J., concurring,

I agree with the majority's disposition of Mr. Brown's claims against Officer Fisher and Officer Weber. I also agree that Mr. Brown's appeal of the dismissal of his claims against County should be dismissed for lack of jurisdiction. I write separately because of my concerns about Mr. Brown's claim against Officer Fisher for an unlawful arrest. In particular, I am troubled by Officer Fisher's conceded lack of state law authority to arrest Mr. Brown for a minor traffic offense - driving with an inoperable headlight at nighttime. Unlike the majority, I think that an arrest made by an officer lacking authority under state law may be unreasonable under the

Fourth Amendment, even if supported by probable cause.

Initially, I note that the Supreme Court's decision in Atwater v. City of Lago Vista, 532 U.S. 318 (2001), does not resolve this issue. There, Texas law expressly authorized any peace officer [to] arrest without warrant a person found committing a violation of [certain] seatbelt laws." Id. at 323 (citations omitted). Thus, the court was not required to address the Fourth Amendment principles that would apply

when, as here, state law authority for the arrest was lacking. As to the law of this circuit, our cases do establish that state law is not controlling in determining whether state officers have violated the Fourth Amendment. Nevertheless, state law may be relevant, and even crucial. See United States v. Mikulski, 317 F.3d 1228, 1232 (10th Cir. 2003) ([T]he question of compliance with state law may well be relevant

in determining whether police conduct was reasonable for Fourth Amendment purposes.") (quoting United States v. Baker, 16 F.3d 854, 856, n.1 (8th Cir. 1994). For example, in

Marshal v. Columbia Lea Regional Hospital, 345 F.3d 1157, 1175 (10th Cir. 2003), we looked to New Mexico law in considering whether there were exigent circumstances sufficient to justify a search. And with regard to traffic

stops, state or local law often determines whether the initial detention is reasonable. See United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995) (en banc) (holding that "a traffic stop is valid under the

Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring").

For me, the difficulty here is that our cases do not set forth a clear standard for determining when a state law violation may render an officer's conduct unreasonable under the Fourth Amendment. In his concurring and dissenting opinion in Abbot v. City of Crocker, 30 F.3d 994 (8th Cir. 1994), the late Judge Richard Arnold offers helpful guidance.

In Judge Arnold's view, "the key issue in determining whether a violation of state law constitutes a violation of the Fourth Amendment, in the context of an arrest, is whether the statute in question is designed to protect individuals from police behavior that would otherwise be unreasonable." Id. at 1000. (Arnold, J. concurring in part and dissenting in part). For Judge Arnold, that reasonableness inquiry requires the court to consider the policies and interests underlying the statutory prohibition of such arrests. Id. Thus, an officer's violation of a state or local statute may render his or her conduct unreasonable if that statute "helps to protect the very interests underlying the Fourth Amendment, those of the individual in privacy and personal freedom, and, [that] at the same time, balances the interests of government in protecting society and making arrests in a safe, efficient, and constitutional manner." Id.; see also Cole v. Neb. Bd. of Parole, 997 F.2d 442, 444 (8th Cir. 1992) ("An arrest by a state actor that is not

authorized by state law is actionable under § 1983 as a seizure contrary to the Fourth Amendment.")

In this case, rather than holding Officer Fisher's lack of state law authority to arrest Mr. Brown is irrelevant to the Fourth Amendment question, I would undertake the inquiry suggested by Judge Arnold. Arguably, Kansas' limitation on police officer's authority to make arrests for minor traffic offenses protects important Fourth Amendment interests. Surely, for a motorist, the difference between merely receiving a citation for such an offense and being transported to jail may be substantial indeed. In that context, I do not think that the fact that there was probable cause that a motorist committed the offense should end the Fourth Amendment reasonableness inquiry.

I acknowledge that our court's decision in United States v. Apodaca, 443 F.3d 1286, 1289 (10th Cir. 2006), does not follow Judge Arnold's approach. Indeed, some of the reasoning in *Apodaca* provides direct support for the majority's view.

However, I do not regard the statements in Apodaca cited by the majority as the law of the circuit. The Apodaca panel was responding to contentions made at oral argument that do not appear to have been made in the briefs and that were not necessary to the disposition of the case. See id. at 1289-90 (noting that the appellant's "sole preserved challenge to her arrest "was that "[a police officer] lacked probable cause to believe that she had violated a restraining order" and thereby suggesting that the

discussion in footnote 2 regarding the significance of a lack of authority to arrest was dicta).

Nevertheless, in light of the conflicting authority cited by the majority, it is evident that Judge Arnold's approach is not clearly established. Thus, I agree that Officer Fisher is entitled to qualified immunity on Mr. Brown's claim for an unlawful arrest.

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No. 07-1408

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IN THE
SUPREME COURT OF THE UNITED STATES

WILLIE R. BROWN,

Petitioner,

vs.

SCOTT FISHER, J.J. WEBER, and
COUNTY OF MIAMI, KANSAS,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Brown's arrest was reasonable under the Fourth Amendment.

2. Even assuming a Fourth Amendment violation, qualified immunity applies because the law applicable to this case was not clearly established in Brown's favor.

3. The dismissal of Miami County without prejudice is not an appealable order. The Tenth Circuit properly dismissed this portion of Brown's appeal for lack of jurisdiction. Even so, the district court's dismissal of the claims against Miami County was proper.

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STATEMENT OF THE CASE

Brown's recitation of the facts is incomplete and peppered with irrelevant commentary. Respondent Scott Fisher, a Miami County deputy sheriff, provides a short statement of pertinent facts below for the Court's convenience.

On February 25, 2004, Brown was driving a pickup truck with a teenage passenger. Brown noticed a sheriff's vehicle behind him when its emergency lights were activated. Brown pulled to the side of the road.

Fisher approached the driver's side window and asked to see Brown's driver's license. Brown did not produce the driver's license. Instead, he asked Fisher if he had probable cause for the stop. Fisher responded that Brown had a headlight out. Brown does not dispute that he was driving with a headlight out.

Fisher asked again to see Brown's driver's license. Brown asked if he were under arrest. Fisher advised Brown he was not, but said that he was going to give Brown a third opportunity to show his driver's license, and if he failed to do so he would be arrested. There is no support in the record for Brown's assertion that Fisher "became irritated" when Brown refused to produce his license. Rather, Brown admitted that Fisher was polite throughout the exchange.

Brown did not produce his driver's license. Fisher returned to his patrol car. As Fisher walked

back to his patrol car, Brown got out of the truck to look behind his seat for his driver's license. Fisher turned and ordered Brown back into his car. Brown complied.

When Fisher returned to Brown's vehicle, Brown was looking through his briefcase to find his driver's license. Fisher told Brown he was under arrest and directed him to get out of the vehicle.

Brown exited his vehicle. Fisher patted him down and handcuffed him. Fisher escorted Brown to the patrol car and placed him inside. Brown has no complaint about the method of handcuffing or the placement in the patrol car.

Fisher returned to Brown's vehicle, got the passenger out of the vehicle, and patted down the passenger. Fisher then went to the driver's side, got in the vehicle, and returned to the patrol car with Brown's billfold which had been left in his open briefcase. Fisher opened the billfold in Brown's presence and located his driver's license in a pocket of the billfold.

Brown was detained at the scene of the traffic stop for about 35 minutes. He does not complain that he was physically mistreated or verbally abused during the detention.

Fisher transported Brown to the Miami County Jail. Brown refused to post a $35 bond. Staff processed Brown into the jail. While Brown was still in the

booking room, Trooper J. J. Weber arrived and handed Fisher an empty open nonalcoholic beer can taken from Brown's vehicle.

Brown was booked into the jail at 10:30 p.m. He was released the next morning at 7:30 a.m. by Undersheriff Mark Schmidt. While in jail, he was given a citation for driving with an open alcoholic beverage container and for failing to display his driver's license on demand.

Brown sued Weber, Fisher and Miami County under 42 U.S.C. § 1983 for violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. The district court determined the claims implicated only the Fourth Amendment. The district court granted summary judgment to Weber and Fisher and dismissed the claims against Miami County without prejudice for lack of proper service.

Brown appealed. The Tenth Circuit reversed the grant of summary judgment against Weber, dismissed the appeal regarding Miami County for lack of jurisdiction, and affirmed all other decisions of the district court. Brown filed a petition for writ of certiorari with this Court seeking review of the grant of summary judgment to Fisher and the dismissal of Miami County.

REASONS FOR DENYING THE WRIT

1. Brown's arrest was reasonable under the Fourth Amendment.

An officer may arrest a person if the officer has probable cause to believe the person has committed "even a very minor criminal offense in his presence." *Atwater v. City of Lago Vista,* 532 U.S. 318, 354 (2001). Here, Brown committed two offenses in Fisher's presence: 1) driving with an inoperable headlight after dark; and 2) failing to produce a driver's license on demand.

Brown does not dispute that Fisher had probable cause to believe he was driving with an inoperable headlight. This is a minor offense, but an offense nonetheless. See K.S.A. 8-1728(a) (requiring two lighted headlights); and K.S.A. 8-1703(a)(1) (requiring display of headlights after sunset). A traffic infraction is specifically included in the definition of a crime. See K.S.A. 21-3105; and *City of Prairie Village v. Eddy,* 14 Kan.App.2d 661, 662, 798 P.2d 66 (1990).

Brown argues that the violation did not supply probable cause for his arrest because it was not an arrestable offense under Kansas law. See K.S.A. 22-2401(d) (officer may arrest for any crime except a traffic or cigarette infraction); K.S.A. 8-2118(c) (K.S.A. 8-1728(a) and 8-1703(a)(1) listed as traffic infractions).

Whether state law allows an arrest for a particular offense is irrelevant to a Section 1983 claim.

Apodaca v. City of Albequerque, 443 F.3d 1286, 1289 n. 2 (10th Cir. 2006). See also *Davis v. Scherer,* 468 U.S. 183, 194-96 (1984) (a violation of state law does not give rise to a claim under Section 1983); *Wilder v. Turner,* 490 F.3d 810, 814 (same); *United States v. Mikulski,* 317 F.3d 1228, 1232 (10th Cir. 2003) ("officers' violation of state law is not, without more, necessarily a federal constitutional violation"); and *United States v. Green,* 178 F.3d 1099, 1105 (10th Cir. 1999) (fact that arrest violated state law does not mean evidence should be suppressed under Fourth Amendment).

Warrantless arrests for "fine-only" offenses or traffic infractions do not necessarily run afoul of the Fourth Amendment. *Atwater,* 532 U.S. at 349-50. See also *United States v. Herbin,* 343 F.3d 807, 810 (6th Cir. 2003) (Fourth Amendment does not prohibit custodial arrest for traffic violation even though not an arrestable offense under state law); *United States v. Bell,* 54 F.3d 502 (8th Cir. 1995) (a federal court does not look to state statutes to determine the validity of an arrest); and *United States v. Laville,* 480 F.3d 187, 191 (3rd Cir. 2007) (reasonableness of arrest does not depend on whether it was authorized by state law).

Brown argues that his arrest for a "fine-only" offense gives rise to a Fourth Amendment violation. Without more, Brown's argument fails. *Atwater, Apodaca* and other Tenth Circuit precedent dictate that Brown's arrest was reasonable under the Fourth Amendment.

The analysis of Brown's claim hinges in large part upon *Atwater,* a case decided by the United States Supreme Court in 2001. Atwater was arrested after a traffic stop for failure to wear her seatbelt and to secure her children with seatbelts. Under Texas law it was an offense punishable only by a fine. After stopping Atwater, the officer berated her, handcuffed her and put her in his patrol car. He drove her to the police station, where she was required to remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took her "mug shot" and placed her in a jail cell. She was released on bond. She later pled no contest and paid a $50 fine. 532 U.S. at 324.

Atwater argued that her Fourth Amendment rights were violated because she was arrested without a warrant for a fine-only offense. The Supreme Court affirmed summary judgment for defendants, reasoning that an arrest survives Fourth Amendment scrutiny if supported by probable cause to believe an offense has been committed and if effected in a reasonable manner. 532 U.S. at 354.

The Tenth Circuit and Kansas district courts have cited and followed *Atwater* without pause in a variety of contexts.

For example, in *Tanberg v. Sholtis,* 401 F.3d 1151, 1157 (10th Cir. 2005), the Tenth Circuit relied on *Atwater* in evaluating the arrest of a person who remained in a public park after closing time. The Tenth Circuit concluded the arrest was reasonable because the officer had probable cause to believe that the person was violating a city ordinance prohibiting

use of public parks during certain hours of the night. See also *Biehl v. Salina Police Dept.*, 2007 WL 2099911 (D.Kan. 2007) (citing *Atwater* for the proposition that "[w]ith probable cause, an officer may arrest an individual for even a very minor criminal offense, if the offense is committed in the officer's presence."); *Wilder v. Turner*, 490 F.3d 810 (10th Cir. 2007) (same); *Bochove v. Village of Corrales*, 2006 WL 1531094 (10th Cir. 2006) (same); *Apodaca*, 443 F.3d 1286 (same); *Teets v. Board of County Com'rs of Osage County, Kansas*, 2003 WL 1565936 (D.Kan. 2003) (cited in upholding arrest for suspected violation of restraining order); *Rucker v. Hampton*, 2002 WL 31341532 (10th Cir. 2002) (noting *Atwater's* holding that "the Constitution tolerates full custodial arrests for fine-only offenses").

Brown argues that *Atwater* is distinguishable because the offense at issue there was statutorily defined as an arrestable offense. Brown uses the same logic to attempt to distinguish *Apodaca*, but there the plaintiff's arrest was upheld based on probable cause to believe that she committed a number of crimes, some arrestable offenses and some not. The Tenth Circuit in *Apodaca* specifically stated that probable cause sufficient to arrest need not be attached to an arrestable offense, but may be attached to any offense at all. 443 F.3d at 1289, fn. 2.

Here, Brown's arrest was supported by probable cause to believe he had committed a traffic infraction. Brown does not dispute that he was driving with an inoperable headlight. Further, Brown does not complain of the manner of his arrest. Thus, Brown's

arrest is reasonable and does not violate the Fourth Amendment.

In addition, the district court concluded that Fisher had probable cause to arrest Brown for failing to display his driver's license upon demand. This is a violation of state law. See K.S.A. 8-244. It is also an arrestable offense. See K.S.A. 22-2401(d) (may arrest for any crime except a traffic or cigarette infraction); K.S.A. 8-2118(c) (violation of K.S.A. 8-244 not listed as a traffic infraction).

The Tenth Circuit correctly concluded that Brown's arrest was supported by probable cause to believe Brown was driving with an inoperable headlight. Brown's arrest was also supported by probable cause to believe Brown did not display his license on demand. Though the Tenth Circuit did not agree with the latter basis for probable cause, this remains an alternative ground for affirming the judgment of the district court and the Tenth Circuit. It may be considered and adopted by the Court as an additional reason to deny the writ. *Thigpen v. Roberts,* 468 U.S. 27, 30 (1984) (this Court "may affirm on any ground that the law and the record permit and that will not expand the relief granted below").

2. **Even assuming a Fourth Amendment violation, qualified immunity applies because the law applicable to this case was not clearly established in Brown's favor.**

Even assuming a Fourth Amendment violation, which respondent vigorously denies, qualified

immunity still applies because the law applicable to this situation was not clearly established in Brown's favor at the time of his arrest.

Once the defense of qualified immunity has been raised, it is plaintiff's burden to prove clearly established law in his favor. *Novitsky v. City of Aurora,* 491 F.3d 1244, 1255 (10th Cir. 2007). Brown must prove the right was sufficiently clear that a reasonable official would have understood that his conduct violated the right. "'Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Currier v. Doran,* 242 F.3d 905, 923 (10th Cir. 2001).

Brown does not and cannot make such a showing here. There was and is no clearly established law which dictates that Brown's constitutional rights were violated by an otherwise reasonable arrest for a fine-only offense. *Atwater, Apodaca* and other Tenth Circuit precedent cited above establish the opposite – that Brown's arrest was reasonable as a matter of law.

Judge Henry, who wrote the concurring opinion in the Tenth Circuit, acknowledged that *Apodaca* supports affirming the district court on this issue. Even if *Atwater* may be distinguished because it involved an arrestable offense, Judge Henry agreed with the majority that the question is close enough to entitle Fisher to qualified immunity.

There was no constitutional violation here. Even if there was, there was no violation of a clearly established right. Applicable law was not and is not clearly established in Brown's favor. If anything, it leans heavily in favor of respondent. For these reasons, qualified immunity applies.

3. **The dismissal of Miami County without prejudice is not an appealable order. The Tenth Circuit properly dismissed this portion of Brown's appeal for lack of jurisdiction. Even so, the district court's dismissal of the claims against Miami County was proper.**

Brown does not address the Tenth Circuit's lack of jurisdiction over the dismissal of Miami County without prejudice. Instead, he attacks the substance of the district court's decision to dismiss Miami County.

Brown sued Fisher, J.J. Weber and Miami County. When attempting to serve Miami County, Brown served process upon an employee of the Clerk of the District Court of Miami County and filed a proof of service to that effect. He did not serve the Miami County Clerk, the Miami County Treasurer or any member of the governing body of Miami County as required by Fed.R.Civ.Pro. 4(j)(2) and K.S.A. 60-304(d)(1).

The district court dismissed Brown's claims against Miami County without prejudice because he failed to effect proper service within 120 days of filing

his complaint. See Fed.R.Civ.Pro 4(m). The district court also observed that Brown failed to allege that Miami County violated his rights through a custom, practice or policy or through the act of a final decision-maker, an element necessary to his claim against Miami County.

Brown challenged the dismissal on appeal to the Tenth Circuit. The Tenth Circuit concluded that it did not have jurisdiction to consider the issue because the dismissal was not a final order. The Tenth Circuit reasoned that the district court's order would have allowed Brown to re-file his case and properly serve Miami County.

Brown ignores the jurisdictional issue in his petition. This is reason enough to deny review of the matter.

Only final decisions of the district court may be appealed. 28 U.S.C. §1291. A dismissal without prejudice is "usually not" a final appealable order. *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001). "In this circuit, whether an order of dismissal is appealable generally depends on whether the district court dismissed the *complaint* or the *action*." *Moya v. Schollenbarger*, 465 F.3d 444, 449 (10th Cir. 2006) (emphasis original).

The district court dismissed the claims against Miami County without prejudice and provided a broad hint to Brown that any re-filed claim against the County should include an allegation of *Monell* liability. In its order, the district court did not dismiss the

entire action nor did it close the doors to the courthouse to Brown's claim against the County. "If it is clear that plaintiff may not start over again with a properly drawn complaint, because of limitations problems or otherwise, the action is treated as final and the order is appealable." *Bragg v. Reed,* 592 F.2d 1136, 1138 (10th Cir. 1979). Here, nothing prevented Brown from refiling a properly drawn complaint against Miami County and effecting proper service. See K.S.A. 60-518 (allowing an action timely filed and dismissed other than on the merits to be filed anew within six months of dismissal).

The district court's dismissal without prejudice was not a final, appealable order. This Court, like the Tenth Circuit, does not have jurisdiction to consider a challenge to dismissal of the claims against Miami County.

Even so, Brown's substantive attack on the dismissal fails. He argues that he obtained proper service on Miami County because the Clerk of the District Court gave the summons to County Attorney David Hager, and this constituted proper service under Fed.R.Civ.Pro. 4(h)(1). Rule 4(h)(1) addresses service of process upon a corporation, partnership or association through an officer or agent. It does not apply to service upon a municipality. In any event, Hager was never served. He simply received the summons from the Clerk of the District Court, who was served.

The district court correctly dismissed the claims against Miami County because Brown did not obtain proper service of process on the County.

On a final note, any claim against Miami County ultimately fails on the merits because its employee, Fisher, did not violate Brown's constitutional rights. The County cannot be held liable where there is no underlying constitutional violation. *Butler v. City of Prairie Village, Kansas,* 172 F.3d 736, 747 (10th Cir. 1999).

CONCLUSION

For the reasons outlined above, Brown's petition for writ of certiorari should be denied.

Teresa L. Watson, *Counsel of Record*
J. Steven Pigg
Attorneys for Respondent

APPENDIX A

K.S.A. 8-244. Licenses to be carried and exhibited upon demand; defense.

Every licensee shall have his or her driver's license in his or her immediate possession at all times when operating a motor vehicle, and shall display the same, upon demand of any officer of a court of competent jurisdiction or any peace officer, examiner or officer of the division of vehicles. However, no person charged with violating this section shall be convicted if such person produces in court or the office of the arresting officer a driver's license theretofore issued to such person and valid at the time of arrest.

APPENDIX B

K.S.A. 8-1728. Number of driving lamps required or permitted.

(a) At all times specified in K.S.A. 8-1703, at least two (2) lighted head lamps shall be displayed, one (1) on each side at the front of every motor vehicle, except when such vehicle is parked, subject to the regulations governing lights on parked vehicles.

(b) Whenever a motor vehicle equipped with head lamps as herein required is also equipped with any auxiliary lamps or a spot lamp or any other lamp on the front thereof projecting a beam of intensity greater than three hundred (300) candlepower, not more than a total of four (4) of any such lamps on the front of a vehicle shall be lighted at any one time when upon a highway.

APPENDIX C

K.S.A. 21-3105. Crimes defined; classes of crimes.

A crime is an act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine, is authorized or, in the case of a traffic infraction or a cigarette or tobacco infraction, a fine is authorized. Crimes are classified as felonies, misdemeanors, traffic infractions and cigarette or tobacco infractions.

(1) A felony is a crime punishable by death or by imprisonment in any state correctional institution or a crime which is defined as a felony by law.

(2) A traffic infraction is a violation of any of the statutory provisions listed in subsection (c) of K.S.A. 8-2118 and amendments thereto.

(3) A cigarette or tobacco infraction is a violation of subsection (m) or (n) of K.S.A. 79-3321 and amendments thereto.

(4) All other crimes are misdemeanors.

APPENDIX D

K.S.A. 60-304. Service of process, on whom made.

As used in this section, 'serving' means making service by any of the methods described in K.S.A. 60-303, and amendments thereto, unless a specific method of making service is prescribed in this section. Except for service by publication under K.S.A. 60-307, and amendments thereto, service of process under this article shall be made as follows:

(a) Individual. Upon an individual other than a minor or a disabled person, by serving the individual or by serving an agent authorized by appointment or by law to receive service of process, but if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. Service by return receipt delivery shall be addressed to an individual at the individual's dwelling house or usual place of abode and to an authorized agent at the agent's usual or designated address. If service by return receipt delivery to the individual's dwelling house or usual place of abode is refused or unclaimed, the sheriff, party or party's attorney seeking service may complete service by certified mail, restricted delivery, by serving the individual at a business address after filing a return on service stating the return receipt delivery to the individual at such individual's dwelling house or usual place

of abode has been refused or unclaimed and a business address is known for such individual.

(b) Minor. Upon a minor, by serving the minor and also either the minor's guardian or conservator if the minor has one within the state or the minor's father or mother or other person having the minor's care or control or with whom such minor resides, or if service cannot be made upon any of them, then as provided by order of the judge. Service by return receipt delivery shall be addressed to an individual at the individual's dwelling house or usual place of abode and to a corporate guardian or conservator at such guardian or conservator's usual place of business.

(c) Disabled person. Upon a disabled person, as defined in K.S.A. 77-201, and amendments thereto, by serving (1) such person's guardian, conservator or a competent adult member of such person's family with whom the person resides, or if such person is living in an institution, then the director or chief executive officer of the institution or, if service cannot be made upon any of them, then as provided by order of the judge, and (2) unless the judge otherwise orders, the disabled person. Service by return receipt delivery shall be addressed to a director or chief executive officer of an institution at the institution, to any other individual at the individual's dwelling house or usual place of abode, and to a corporate guardian or conservator at such guardian or conservator's usual place of business.

(d) Governmental bodies. (1) Upon a county, by serving one of the county commissioners or the county clerk or the county treasurer; (2) upon a township, by serving the clerk or the trustee; (3) upon a city, by serving the clerk or the mayor; (4) upon any other public corporation, body politic, district or authority by serving the clerk or secretary or, if not to be found, to any officer, director or manager thereof; and (5) upon the state or any governmental agency of the state, when subject to suit, by serving the attorney general or an assistant attorney general. Service by return receipt delivery shall be addressed to the appropriate official at the official's governmental office. Income withholding orders for support and orders of garnishment of earnings of state officers and employees shall be served upon the state or governmental agency of the state in the manner provided by K.S.A. 60-723 and amendments thereto.

(e) Corporations, domestic or foreign limited liability company, domestic or foreign limited partnership, domestic or foreign limited liability partnership, and partnerships. Upon a domestic or foreign corporation, domestic or foreign limited liability company, domestic or foreign limited partnership, domestic or foreign limited liability partnership or upon a partnership or other unincorporated association, when by law it may be sued as such, (1) by serving an officer, manager, partner or a resident, managing or general agent, or (2) by leaving a copy of the summons and petition at any business office of

the defendant with the person having charge thereof, or (3) by serving any agent authorized by appointment or required by law to receive service of process, and if the agent is one authorized by law to receive service and the law so requires, by also mailing a copy to the defendant. Service by return receipt delivery on an officer, partner or agent shall be addressed to such person at the person's usual place of business.

(f) Corporation, limited liability company, limited partnership or limited liability partnership resident agent. Whenever any domestic corporation, domestic limited liability company, domestic limited partnership, or any foreign corporation, foreign limited liability company, or foreign limited partnership authorized to transact business or transacting business without authority in this state, fails to appoint or maintain in this state a resident agent upon whom service of legal process or service of any such notice or demand may be had, whenever the resident agent of such corporation, limited liability company or limited partnership cannot with reasonable diligence be found at the registered office in this state, the secretary of state shall be irrevocably authorized as the agent and representative of the corporation, limited liability company or limited partnership to accept service of any process or service of any notice or demand required or permitted by law to be served upon the corporation, limited liability company or limited partnership. Service on the secretary of state of any process, notice or demand against

the corporation, limited liability company or limited partnership shall be made by delivering to the secretary of state by personal service or by return receipt delivery, the original and two copies of the process and two copies of the petition, notice or demand, or the clerk of the court may send the original process and two copies of both the process and the petition, notice or demand directly to the secretary of state by return receipt delivery. In the event that any process, notice or demand is served on the secretary of state, the secretary shall immediately cause a copy of such process, notice or demand to be forwarded by return receipt delivery, addressed to the corporation, limited liability company or limited partnership at its principal office as it appears in the records of the secretary of state, or to the registered or principal office of the corporation, limited liability company or limited partnership in the state of its incorporation or formation. The secretary of state shall keep a record of all processes, notices and demands served upon the secretary under this subsection, and shall record in the record the time of the service and the action of the secretary with reference to it. A fee of $40 shall be paid to the secretary of state by the party requesting the service of process, to cover the cost of such service of process, except the secretary of state may waive the fee for state agencies. That fee shall not be included within or paid from any deposit as security for any costs or docket fee required by K.S.A. 60-2001 or 61-4001, and amendments thereto.

(g) Insurance companies or associations. Service of summons or other process may also be made on any insurance company or association, organized under the laws of the state of Kansas by service on the commissioner of insurance in the same manner as that provided for service on foreign insurance companies. All the requirements of law relating to service on foreign insurance companies so far as applicable shall also apply to domestic insurance companies.

(h) Service upon an employee. If the plaintiff or the plaintiff's agent or attorney files an affidavit that to the best of the affiant's knowledge and belief the defendant is a nonresident who is employed in this state, or that the place of residence of the defendant is unknown, the affiant may direct that the service of summons or other process be made by the sheriff or other duly authorized person by directing an officer, partner, managing or general agent, or the person having charge of the office or place of employment at which the defendant is employed, to make the defendant available for the purpose of permitting the sheriff or other duly authorized person to serve the summons or other process.

APPENDIX E

K.S.A. 60-518. New action, when.

If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if the plaintiff die, and the cause of action survive, his or her representatives may commence a new action within six (6) months after such failure.